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092
No. 2787

United States
Circuit Court of Appeals

For the Ninth Circuit.

CONSOLIDATED MUTUAL OIL COMPANY, a
Corporation, and J. M. McLEOD,
Appellants,
vs.

THE UNITED STATES OF AMERICA,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for
the Southern District of California,
Southern Division.

Filed

SEP 23 1916

F. D. Monckton,
Clerk.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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and FRANK HALL, Esq., Special Assist-
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fornia. [4*]

*Page-number appearing at foot of page of original certified Record.

*In the United States Circuit Court of Appeals for
the Ninth Judicial Circuit.*

No. —.

UNITED STATES OF AMERICA,
Plaintiff and Appellee,
vs.

RECORD OIL COMPANY, CONSOLIDATED
MUTUAL OIL COMPANY, MAYS CON-
SOLIDATED OIL COMPANY, J. M. Mc-
LEOD, LOUIS TITUS, NORTH AMERI-
CAN OIL CONSOLIDATED, STANDARD
OIL COMPANY, GENERAL PETROLEUM
COMPANY, ASSOCIATED OIL COM-
PANY and L. B. McMURTRY,
Defendants and Appellants.

Citation on Appeal.

United States of America,—ss.

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, Ninth Circuit, to be held at San Francisco, California, on the 1st day of April, 1916, being within thirty days from the date hereof pursuant to an order allowing an appeal of record in the clerk's office of the District Court of the United States for the Southern District of California, in the suit numbered A-41—Equity in the records of said court, wherein the United States of America is plaintiff and appellee, and among others, Consolidated Mutual Oil Com-

pany and J. M. McLeod are defendants and appellants, to show cause, if any there be, why the interlocutory decree appointing a receiver, rendered against the said Consolidated Mutual Oil Company and said J. M. McLeod should not be corrected, and why speedy justice should not be done in that behalf. [5]

WITNESS, the Honorable M. T. DOOLING,
United States District Judge, this 3d day of March,
1916.

M. T. DOOLING,
Judge. [6]

Due service and receipt of a copy of the within Citation on Appeal this 3d day of March, 1916, is hereby admitted.

E. J. JUSTICE,
Attorney for Plff.
J. W. W.

[Endorsed]: No. A-41. In the United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Plaintiff and Appellee, vs. Record Oil Company et al., Defendants and Appellants. Citation. Filed Mar. 4, 1916. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. [7]

*In the District Court of the United States, in and
for the Southern District of California, Northern
Division.*

No. A-41—EQUITY.

THE UNITED STATES OF AMERICA,
Complainants,
vs.

RECORD OIL COMPANY, CONSOLIDATED
MUTUAL OIL COMPANY, MAYS CON-
SOLIDATED OIL COMPANY, J. M. Mc-
LEOD, LOUIS TITUS, NORTH AMERI-
CAN OIL CONSOLIDATED, STANDARD
OIL COMPANY, GENERAL PETROLEUM
COMPANY, ASSOCIATED OIL COM-
PANY and L. B. McMURTRY,
Defendants. [8]

*In the District Court of the United States, for
the Southern District of California, Northern
Division, Ninth Circuit.*

UNITED STATES OF AMERICA,
Plaintiff,
vs.

RECORD OIL COMPANY, CONSOLIDATED
MUTUAL OIL COMPANY, MAYS CON-
SOLIDATED OIL COMPANY, J. M. Mc-
LEOD, LOUIS TITUS, NORTH AMERI-
CAN OIL CONSOLIDATED, STANDARD
OIL COMPANY, GENERAL PETROLEUM

COMPANY, ASSOCIATED OIL COMPANY and L. B. McMURTRY,
Defendants.

Bill of Complaint.

To the Judges of the District Court of the United States for the Southern District of California, Sitting Within and for the Northern Division of Said District.

The United States of America, by Thomas W. Gregory, its Attorney General, presents this, its bill in equity, against Record Oil Company, Consolidated Mutual Oil Company, Mays Consolidated Oil Company, J. M. McLeod, Louis Titus, North American Oil Consolidated, Standard Oil Company, General Petroleum Company, Associated Oil Company and L. B. McMurtry (citizens and residents, respectively, as stated in the next succeeding paragraph of this bill), and for cause of complaint alleges:

I.

Each of the defendants, Record Oil Company, Consolidated Mutual Oil Company, North American Oil Consolidated, [9] Standard Oil Company, General Petroleum Company and Associated Oil Company, now is, and at all the times hereinafter mentioned as to it was a corporation, organized under the laws of the State of California.

The defendant, Mays Consolidated Oil Company, now is, and at all the times hereinafter mentioned as to it was a corporation, organized under the laws of the State of Nevada.

The defendants, J. M. McLeod, Louis Titus and

L. B. McMurtry, now are, and at all the times hereinafter mentioned as to them were residents and citizens of the State of California, as complainant is advised and believes and so alleges.

II.

For a long time prior to and on the 27th day of September, 1909, and at all times since said date, the plaintiff has been and now is the owner and entitled to the possession of the following described petroleum, or mineral oil, and gas lands, to wit:

The Northeast quarter of Section twenty-eight (28), Township Thirty-one (31) South, Range Twenty-three (23) East, M. D. M.
and of the oil, petroleum, gas, and all other minerals contained in said land.

III.

On the 27th day of September, 1909, the President of the United States, acting by and through the Secretary of the Interior, and under the authority legally invested in him so to do, duly and regularly withdrew and reserved all of the land hereinbefore particularly described (together with other lands) from mineral exploration, and from all forms of location or settlement, selection, filing, [10] entry, patent, occupation, or disposal, under the mineral and nonmineral land laws of the United States, and since said last-named date, none of said lands have been subject to exploration for mineral oil, petroleum, or gas, occupation or the institution of any right under the public land laws of the United States.

IV.

Notwithstanding the premises, and in violation of the proprietary and other rights of this plaintiff, and in violation of the laws of the United States and lawful orders and proclamations of the President of the United States, and particularly in violation of the said order of withdrawal of the 27th of September, 1909, the defendants herein, Record Oil Company, Consolidated Mutual Oil Company, Mays Consolidated Oil Company, North American Oil Consolidated, J. M. McLeod, and Louis Titus, entered upon the said land hereinbefore particularly described, long subsequent to the 27th day of September, 1909, for the purpose of exploring said land for petroleum and gas.

V.

Said defendants, Record Oil Company, Consolidated Mutual Oil Company, Mays Consolidated Oil Company, North American Oil Consolidated, J. M. McLeod, and Louis Titus, had not discovered petroleum, gas or other minerals on said land on or before the 27th day of September, 1909, and had acquired no rights on, or with respect to said land, on or prior to said date.

VI.

Long after the said order of withdrawal of September 27, 1909, to wit, some time in the latter part of the year 1910, as plaintiff is informed and believes, there was first [11] produced minerals, to wit, petroleum and gas, on or from said land, and the defendants, Record Oil Company, Consolidated Mutual Oil Company, Mays Consolidated Oil Com-

pany, North American Oil Consolidated, J. M. McLeod, and Louis Titus, have produced and caused to be produced therefrom large quantities of petroleum and gas, but the exact amount so produced plaintiff is unable to state. Of the petroleum and gas so produced large quantities thereof have been sold and delivered by the said defendants, Consolidated Mutual Oil Company, North American Oil Consolidated, J. M. McLeod and Louis Titus, to the Standard Oil Company, General Petroleum Company and Associated Oil Company, and by the said defendant, Record Oil Company to the Standard Oil Company and by the said defendant, Mays Consolidated Oil Company to the Standard Oil Company and the General Petroleum Company, and the said defendants, Record Oil Company, Consolidated Mutual Oil Company, North American Oil Consolidated, Mays Consolidated Oil Company, J. M. McLeod and Louis Titus, have sold and disposed of oil and gas produced from said land to others, to plaintiff unknown. Plaintiff does not know and is therefore unable to state the amount of petroleum and gas which defendants, Record Oil Company, Consolidated Mutual Oil Company, Mays Consolidated Oil Company, North American Oil Consolidated, J. M. McLeod and Louis Titus, have extracted from said land and sold, nor the amount extracted and now remaining undisposed of; nor the price received for such oil and gas as has been sold, and has no means of ascertaining the facts in the premises, except from said defendants, Record Oil Company, Consolidated Mutual Oil Company, Mays Consoli-

dated Oil Company, North American Oil Consolidated, J. M. McLeod, Louis [12] Titus, Standard Oil Company, General Petroleum Company, and Associated Oil Company, and, therefore, a full discovery from said defendants is sought herein.

VII.

The defendants, Record Oil Company, Consolidated Mutual Oil Company, Mays Consolidated Oil Company, North American Oil Consolidated, J. M. McLeod and Louis Titus, are now extracting oil and gas from said land, drilling oil and gas wells, and otherwise trespassing upon said land and asserting claims thereto, and if they continue to procure oil and gas therefrom, it will be taken and wrongfully sold and converted, and various other trespasses and waste will be committed upon said land, to the irreparable injury of complainant, and will interfere with the policies of the complainant with respect to the conversation, use and disposition of said land, and particularly the petroleum, oil and gas contained therein.

VIII.

Each of the defendants claims some right, title or interest in said land, or some part thereof, or in the oil, petroleum, or gas extracted therefrom, or in or to the proceeds arising from the sale thereof, or through and by purchase thereof, and each of said claims is predicated upon or derived directly or mediately from some pretended notice or notices of mining locations, and by conveyances, contracts or liens directly or mediately from said such pretended locators. But none of such location notices and

claims are valid against complainant, and no rights have accrued to the defendants, or either of them, thereunder, either directly or mediately; nor have any minerals [13] been discovered or produced on said land except as hereinbefore stated; but said claims so asserted cast a cloud upon the title of the complainant, and wrongfully interfere with its operation and disposition of said land, to the great and irreparable injury of complainant; and the complainant is without redress or adequate remedy save by this suit, and this suit is necessary to avoid a multiplicity of actions.

IX.

Neither of the defendants, nor any person or corporation from whom they have derived any alleged interest, was, at the date of said order of withdrawal of September 27, 1909, nor was any other person at such date, a *bona fide* occupant or claimant of said land and in the diligent prosecution of work leading to the discovery of oil or gas.

X.

The defendants, Record Oil Company, Consolidated Mutual Oil Company, Mays Consolidated Oil Company, North American Oil Consolidated, J. M. McLeod and Louis Titus, claim said lands under an alleged location notice, which purports to have been posted and filed in the names of Frank D. Taylor, Edwin L. Powell, Daniel W. Darling, J. W. Pentz, S. H. Freeman, C. W. Thorn, J. F. Harder and F. H. Searles, and known as the "Ohio" placer mining claim; bearing date January 5, 1909.

XI.

The said location notice was filed and posted by or for the sole benefit of the defendant, J. M. McLeod, or someone else other than the persons whose names were used in said pretended location notice, and the names [14] of the pretended locators above set out, were used to enable J. M. McLeod, or some other person than said persons whose names were so used, to acquire more than twenty acres of mineral land in violation of the laws of the United States. The said persons whose names were so used in said location notice were not *bona fide* locators, and each of them was without an interest in said location notice so filed, and their names were not used to enable them, or either of them, to secure said land or patent therefor; but each of said persons was a mere dummy, used for the purposes alleged, all of which complainant is informed and believes, and so alleges.

XII.

Except as in this bill stated, the plaintiff has no other knowledge or information concerning the nature of any other claims asserted by the defendants herein, or any of them, and therefore leaves said defendants, to set forth their respective claims of interest.

In that behalf the plaintiff alleges that, because of the premises of this bill, none of the defendants have, or ever had any right, title or interest in or to, or lien upon said land, or any part thereof, or any right, title or interest in or to the petroleum, mineral oil or gas deposited therein, or any right to ex-

tract the petroleum or mineral oil or gas from said land, or to convey or dispose of the petroleum and gas so extracted, or any part thereof; on the contrary, the acts of those defendants who have entered upon said land and drilled oil wells, and used and appropriated the petroleum and gas deposited therein, and assumed to sell and convey any interest in or to any part of said land, were all in violation [15] of the laws of the United States and the aforesaid order withdrawing and reserving said land, and all of said acts were and are in violation of the rights of the plaintiff, and such acts interfere with the execution by complainant of its public policies with respect to said land.

XIII.

The present value of said land hereinbefore described exceeds Two Hundred Thousand Dollars.

In consideration of the premises thus exhibited, and inasmuch as plaintiff is without full and adequate remedy in the premises, save in a court of equity where matters of this nature are properly cognizable and relievable, plaintiff prays:

1. That said defendants, and each of them, may be required to make full, true and direct answer respectively to all and singular the matters and things hereinbefore stated and charged, and to fully disclose and state their claims to said land hereinbefore described, and to any and all parts thereof, as fully and particularly as if they had been particularly interrogated thereunto, but not under oath, answer under oath being hereby expressly waived.

2. That the said land may be declared by this

Court to have been at all times from and after the 27th day of September, 1909, lawfully withdrawn from mineral exploration, and from all forms of location, settlement, selection, filing, entry or disposal under the mineral or nonmineral public land laws of the United States; and that the said location notice was fraudulently filed, and the said defendants did not acquire any right thereunder; [16]

3. That said defendants, and each of them, may be adjudged and decreed to have no estate, right, title, interest or claim in or to said land, or any part thereof, or in or to any mineral or minerals or mineral deposits contained in or under said land, or any part thereof; and that all and singular of said land, together with all of the minerals and mineral deposits, including mineral oil, petroleum and gas therein or thereunder contained, may be adjudged and decreed to be the perfect property of this plaintiff, free and clear of the claims of said defendants, and each and every one of them;

4. That each and all of the defendants herein, their officers, agents, servants and attorneys, during the progress of this suit, and thereafter, finally and perpetually may be enjoined from asserting or claiming any right, title, interest, claim or lien in or to the said land, or any part thereof, or in or to any of the minerals, or mineral deposits therein, or thereunder contained; and that each and all of the defendants herein, their officers, agents, servants and attorneys, during the progress of this suit, and thereafter, finally and perpetually may be enjoined from going upon any part or portion of said land,

and from in any manner using any of said land and premises, and from in any manner extracting, removing or using any of the minerals deposited in or under said land and premises, or any part or portion thereof, or any of the other natural products thereof, and from in any manner committing any trespass or waste upon any of said land, or with reference to any of the mineral deposited therein or thereunder, or any of the other natural products thereof; [17]

5. That an accounting may be had by said defendants, and each and every one of them, wherein said defendants, and each of them, shall make a full, complete, itemized and correct disclosure of the quantity of minerals (and particularly petroleum) removed or extracted or received by them, or either of them, from said land, or any part thereof, and of any and all moneys or other property or thing of value, received from the sale or disposition of any and all minerals extracted from said land, or any part thereof, and of all rents and profits received under any sale, lease, transfer, conveyance, contract, or agreement concerning said land, or any part thereof; and that plaintiff may recover from said defendants, respectively, all damages sustained by the plaintiff in these premises;

6. That a receiver may be appointed by this Court to take possession of said land, and of all wells, derricks, drills, pumps, storage vats, pipes, pipe-lines, shops, houses, machinery, tools and appliances of every character whatsoever thereon, belonging to or in the possession of said defendants, or any of them, which have been used or now are

being used in the extraction, storage, transportation, refining, sale, manufacture, or in any other manner in the production of petroleum or petroleum products or other minerals from said land or any part thereof, for the purpose of continuing, and with full power and authority to continue the operations on said land in the production and sale of petroleum and other minerals when such course is necessary to protect the property of the complainant against injury and waste, and for the preservation, protection and use of the oil [18] and gas in said land, and the wells, derricks, pumps, tanks, storage, vats, pipes, pipe-lines, houses, shops, tools, machinery, and appliances being used by the defendants, their officers, agents or assigns, in the production, transportation, manufacture, or sale of petroleum or other minerals from said land, or any part thereof, and that such receiver may have the usual and general powers vested in receivers of courts of chancery.

7. That plaintiff may have such other and further relief as in equity may seem just and proper.

To the end therefore that this plaintiff may obtain the relief to which it is justly entitled in the premises, may it please your Honors to grant unto the plaintiff a writ or writs of subpoena, issued by and under the seal of this Honorable Court, directed to said defendants herein, to wit, Record Oil Company, Consolidated Mutual Oil Company, Mays Consolidated Oil Company, J. M. McLeod, Louis Titus, North American Oil Consolidated, Standard Oil Company, General Petroleum Company, Associated Oil Company and L. B. McMurtry, therein and

thereby commanding them, and each of them, at a certain time, and under a certain penalty therein to be named, to be and appear before this Honorable Court, and then and there, severally, full, true and direct answers make to all and singular the premises, but not under oath, answer under oath being hereby expressly waived, and stand to perform and abide by such order, direction and decree as may be made against [19] them, or any of them, in the premises, *and* shall be meet and agreeable to equity.

THOMAS W. GREGORY,

Attorney General of the United States.

ALBERT SCHOONOVER,

United States District Attorney.

E. J. JUSTICE,

Special Assistant to the Attorney General.

A. E. CAMPBELL,

Special Assistant to the Attorney General.

[20]

United States of America,

Southern District of California,—ss.

R. W. Dyer, being first duly sworn, deposes and says:

He is now, and has been since the 29th day of April, 1911, a special agent of the General Land Office of the United States, and, since the 20th day of June, 1913, has been engaged in the investigation of facts relating to the lands withdrawn by the President as oil lands, and especially the lands withdrawn by order of September 27, 1909, and by the order of July 2d, 1910. That from such examina-

tion of such lands, and the facts ascertained in relation thereto, and from the examination of the records of the General Land Office, and the local land offices of complainant in said State of California, and the examination of court records and county records, and particularly from affidavits setting forth the facts, he is informed as to the matters and things stated in the foregoing complaint, with reference to the particular lands therein described; and the matters therein stated are true, except as to such matters as are stated to be on information and belief, and as to those, affiant, after investigation, states he believes them to be true.

R. W. DYER.

Subscribed and sworn to before me this 16th day of October, 1915.

[Seal]

T. L. BALDWIN,

Deputy Clerk U. S. District Court, Northern District of California. [21]

[Endorsed]: No. A-41—Eq. In the District Court of the United States for the Southern District of California. United States of America, Plaintiff, vs. Record Oil Company et als., Defendants. Bill of Complaint. Filed Oct. 25, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. [22]

*In the District Court of the United States, for the
Southern District of California, Northern Di-
vision, Ninth Circuit.*

No. A-41—EQUITY.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RECORD OIL COMPANY et al.,

Defendants.

Answer of Consolidated Mutual Oil Company.

Comes now the Consolidated Mutual Oil Company, one of the defendants named in the above-entitled and numbered suit, and answers the bill of complaint on file therein as follows:

FIRST DEFENCE.

As and for its first defence to the cause of action set forth in said bill of complaint, said defendant moves the Court for an order transferring said suit to the law side and calendar of the above-entitled court for trial and final disposition.

Said motion is made and based upon the ground that upon the allegations of the bill of complaint and from the prayer thereof it appears that said suit is one in ejectment brought by the plaintiff out of possession against the defendants in possession of the lands described in the bill of complaint and for damages for past trespasses [23] both subjects of litigation over which a court of equity has no jurisdiction, and upon which the plaintiff has full,

complete, speedy and adequate remedy in a court of law.

Said motion will be made and based upon the pleadings, records and files in the above-entitled and numbered suit.

SECOND DEFENCE.

As and for its second defence to the cause of action set forth in the bill of complaint on file in the above-entitled and numbered suit, this defendant moves the Court for an order striking out of said complaint the portions thereof following:

1. That portion of Paragraph VI beginning with the words "Plaintiff does not know" and ending with the words "is sought herein."

2. All of Paragraph VII.

3. That part of Paragraph VIII which reads as follows: "and wrongfully interfered with its operation and disposition of said land to the great and irreparable injury of complainant; and the complainant is without redress or adequate remedy save by this suit, and this suit is necessary to avoid a multiplicity of actions."

4. That part of Paragraph XII following: "and such acts interfere with the execution by complainant of its public policies with respect to said lands."

5. All of Paragraph XIII.

6. That portion of the bill of complaint following Paragraph XIII which reads: "[24] complainant is without full and adequate remedy in the premises, save in a court of equity where matters of this nature are properly cognizable and relievable."

7. All of Paragraphs 4, 5 and 6 of the prayer of said bill of complaint.

Said motion will be made and based upon the ground that the portions of the bill of complaint above specified are and constitute scandalous and impertinent matter inserted in the bill of complaint and are redundant and surplusage.

Said motion will be made and based upon the pleadings, records and files in the above-entitled and numbered suit.

THIRD DEFENCE.

As and for its third defence to the cause of action set forth in the bill of complaint on file in the above-entitled and numbered suit, the defendant, Consolidated Mutual Oil Company, alleges that the above-entitled Court, sitting as a court of equity, has no jurisdiction of the subject matter of said suit for that the allegations of the bill of complaint show that the main case made thereby and the chief object and purpose of the suit is to try the question of title to the land as between the plaintiff out of possession and the defendants in possession of the land described in the bill of complaint; to secure possession thereof from the defendants; and a judgment for damages for alleged trespasses, all subjects without the jurisdiction of the court of equity and upon which plaintiff has full, adequate, speedy and [25] complete remedy and relief in a court of law.

FOURTH DEFENCE.

As and for its fourth defence to the cause of action set forth in the bill of complaint on file in the

above-entitled and numbered suit, said defendant, Consolidated Mutual Oil Company, alleges:

That on January 1, 1909, the land described in said bill of complaint was public mineral land of the United States subject to location and purchase under the laws of the United States relating to the sale and disposition of lands commonly known as placers, and on said date the eight persons named as locators in Paragraph X of said bill of complaint, each being then a citizen of the United States, and all having theretofore associated themselves together for the purpose of acquiring title to oil lands in the County of Kern, State of California, duly located said land as the Ohio Placer Mining Claim and recorded notice of location thereof on January 5, 1909, in Book 77 of Mining Records, at page 1, records of Kern County, California.

Thereafter and on June 17, 1909, the said locators conveyed all of their right, title and interest in and to said land to J. M. McLeod, one of the defendants in the above-entitled action; that ever since said date said J. M. McLeod has claimed to be the owner of said land openly and notoriously and during said time has held said land and caused the same to be worked and developed for its minerals.

That on June 18, 1914, said J. M. McLeod made mineral entry of said land and other land in the United [26] States Land Office at Visalia, California, its Serial No. 04655, for the whole of the land described in said bill of complaint, under and pursuant to the provisions of Section 2332 of the Revised Statutes of the United States and Rules 74 to

77 inclusive, of the regulations promulgated by the Secretary of the Interior under and pursuant to the provisions of said section of the Revised Statutes of the United States; that notice of said mineral entry was given by said J. M. McLeod in all respects as required by law and the rules and regulations of the Department of the Interior, and on September 19, 1914, said J. M. McLeod having theretofore complied in every respect with the laws of the United States relating to the sale and disposition of its mineral lands commonly called placers, and with all of the rules and regulations promulgated thereunder by the Department of the Interior, paid to the United States, the plaintiff in this suit, and said plaintiff accepted without objection or protest of any kind, the sum of \$2.50 per acre for said land, or a total of \$400 therefor, and the receiver of the United States Land Office at Visalia issued his final receipt therefor No. 1,493,022 on said last-mentioned date.

That at the time of the making of said mineral entry a copy of the notice thereof and of the affidavit as to expenditures and improvements upon said land was furnished by said McLeod to the Chief of Field Division for the Visalia Land District.

That on October 31, 1914, the Register of the United States Land Office at Visalia, California, issued a final certificate of entry, certifying therein and thereby that said J. M. McLeod was entitled to have issued to him a United States Patent for the lands described in [27] said bill of complaint, and other lands described in said certificate of entry.

That by reason of the foregoing facts set forth in this defence said J. M. McLeod became and was, on October 31, 1914, long before the filing of the bill of complaint in this action, the owner of the land described in said bill of complaint and of the whole thereof, and the plaintiff in this suit was and is estopped and precluded from at any time after October 31, 1914, questioning the title of said J. M. McLeod to said land or any part thereof or to the minerals therein contained or extracted therefrom at any time prior to the date of the filing of said bill of complaint.

That this defendant, Consolidated Mutual Oil Company, claims and owns and has an interest in the land described in said bill of complaint as lessee thereof, by virtue of leases in writing and duly recorded in the office of the recorder of Kern County, California, executed and delivered by said J. M. McLeod and others claiming by, through and under him.

FIFTH DEFENCE.

As and for a fifth defence to the bill of complaint on file in the above-entitled action, this defendant alleges:

That in the development of the land described in said bill of complaint there has been expended many thousands of dollars and the said development work has extended over and been carried on diligently during a period of more than five years last past, all in strict conformity with the rules, regulations, customs and [28] interpretations of the mining laws of the United States that have been in exist-

ence and acquiesced in by the plaintiff herein and its Congress and the Department of the Interior for more than forty years prior to the filing of the complaint herein; that said work of development was also in conformity with the policy of said plaintiff, that had been well settled and acted upon for a like period of time; that the large amount of money and time aforesaid was expended in good faith and for the purpose of honestly acquiring title to said land and also upon the faith of said long existent rules, customs, regulations and policies and upon the belief that plaintiff would not suddenly, as it now has, by the filing of this suit, reverse the same, to the irreparable injury of this defendant, its predecessors in interest and said J. M. McLeod and those claiming by, through and under him.

That the doing of said work of development and the expenditure of time and money in connection therewith was at all times with the full knowledge of this plaintiff by and through examinations of said land and of the things being done thereon made at various times by the agents of the Department of the Interior and reports thereof by said *against to* said department, but notwithstanding such knowledge this plaintiff made no objection whatever at any time prior to the filing of said bill of complaint to the claim of title to said land by said J. M. McLeod and those claiming by, through and under him, or to the possession, occupation and working thereof by said persons, until the filing of said bill of complaint, and on account of such failure on the part of this plaintiff make objections [29] as aforesaid, said J. M.

McLeod and those claiming by, through and under him, including this defendant, were warranted in believing and did believe that the plaintiff did not and would not object to the use and occupation of said land or the claim of title thereto aforesaid, or the extraction and use of minerals therefrom and said expenditures of money and time were made in full reliance upon such belief.

That by reason of the matters and things in this defence alleged, this defendant alleges, asserts and insists that the plaintiff is estopped from now claiming that it is entitled to the possession of said land or any part thereof, or of the mineral therein, or which has been produced therefrom or any part thereof, and that said plaintiff is guilty of laches in the institution of this suit and in objection to the rights and title of this defendant, said J. M. McLeod, or of any person claiming by, through or under him, and ought not now in all equity and good conscience to be heard to assert any claim or right to dispossess this defendant or any of the other defendants claiming an interest in said land or to assert any claim of right or title to any part of the minerals therein or heretofore extracted therefrom.

SIXTH DEFENCE.

Without waiving but, on the contrary, expressly reserving the full benefit of each of the defences heretofore set forth, this defendant, the Consolidated Mutual Oil Company, as and for its sixth defence to the cause of action set forth in the bill of complaint on file in the above-entitled suit, admits, denies and alleges as follows:

I.

Admits the allegations of Paragraph I of said [30] bill of complaint.

II.

Denies that the plaintiff, at any of the times mentioned in Paragraph II of said bill of complaint, has been or now is the owner or entitled to the possession of the land described in said Paragraph II, or of any part thereof, or of the oil, petroleum, gas or any other minerals contained in said land, except subject to the right, title and interest therein of this defendant and of its codefendants Mays Consolidated Oil Company and J. M. McLeod.

On the contrary this defendant alleges that at the time of the filing of said bill of complaint and for a long time prior thereto this defendant was in the possession of said lands and rightfully entitled to hold possession thereof and to extract and dispose of the minerals therein contained for its own use and benefit by virtue of compliance and in good faith by its predecessors in interest with the laws of the United States relating to the sale and disposition of its mineral lands and by virtue of the Act of Congress of June 25, 1910 (36 Stats. at L. 847).

III.

Admits that on September 27, 1909, the President of the United States, acting by and through the Secretary of the Interior, issued an order temporarily withdrawing from location, selection, settlement, filing, entry, patent or occupation under the mineral or nonmineral public land laws the lands, among

others, described in Paragraph II of said bill of complaint, but denies that said order withdrew said land or any part thereof from mineral occupation or exploration; denies that since [31] September 27, 1909, none of said lands have been subject to exploration for mineral, oil, petroleum or gas, or to occupation or to the institution of any right thereto under the public land laws of the United States.

On the contrary this defendant alleges that as to the lands described in Paragraph II of said bill of complaint, this defendant, the Mays Consolidated Oil Company, and J. M. McLeod, were at the time of the filing of said bill of complaint and for a long time prior thereto authorized by the provisions of said Act of Congress, approved June 25, 1910, to continue in the occupation of said land and in its exploration and development for petroleum or gas or any other minerals therein contained for that by the terms of said Act of Congress whatever force or effect said order of withdrawal of September 27, 1909, had as to said land described in said Paragraph II was vacated and made null and void.

IV.

Denies that this defendant or its codefendants, J. M. McLeod and Mays Consolidated Oil Company, entered upon the land referred to in Paragraph IV of said bill of complaint and long or at any other time subsequent to September 27, 1909, for the purpose of exploring said land for petroleum or gas.

On the contrary this defendant alleges that its codefendant, J. M. McLeod, entered upon said land for

said purpose long prior to September 27, 1909, and on said date he was a *bona fide* occupant and claimant of the land described in said Paragraph II and the whole thereof in diligent prosecution of work leading to a [32] discovery of oil or gas and thereafter continued in diligent prosecution of said work until the discovery in said land of petroleum therein.

Denies that any entry upon said land by said defendants or either of them was in violation of any proprietary or other right of the plaintiff or in violation of the laws of the United States or the lawful orders or proclamations of the President of the United States or in violation of said order of withdrawal of September 27, 1909.

V.

Denies that a discovery of petroleum, gas or other minerals was not made on said land described in said Paragraph II on or before September 27, 1909, and denies that defendants J. M. McLeod, Mays Consolidated Oil Company, or this defendant, had acquired no rights on or with respect to said land on or prior to said date.

VI.

Denies that mineral was first produced upon said land in the latter part of the year 1910 or long after said order of withdrawal of September 27, 1909.

Admits that this defendant has produced petroleum from said land in the total amount of 761,839.41 barrels and that there has been sold to the General Petroleum Company 508,696.28 barrels, to the Standard Oil Company 105,312.01 barrels and to the Asso-

ciated Oil Company 147,831.12 barrels.

VII.

Admits that this defendant is now extracting oil from said land but denies that it is now drilling oil or gas wells thereon or in any wise trespassing upon said land; or that it will be wrongfully sold or converted; [33] denies that various or any trespasses or waste will be committed upon said land if this defendant continues to procure oil or gas therefrom, to the irreparable or other injury of the complainant.

Denies that anything being done upon said land by this defendant will in any way interfere with the policies of the complainant mentioned in Paragraph VII of said bill of complaint.

VIII.

Admits that this defendant claims a right, title and interest in the land described in Paragraph II of said bill of complaint and in and to the oil, petroleum and gas therein and extracted therefrom and in the proceeds arising from the sale thereof, and that said claim is predicated upon the location thereof by the predecessors in interest of this defendant under the mining laws of the United States, to wit, a location made by the locators named in Paragraph X of said bill of complaint.

Denies that said location or that said claim is invalid against the plaintiff or that no rights have accrued to this defendant either directly or immediately under said location; denies that said claim so asserted casts a cloud upon the title of the complainant or wrongfully interfered with its operation or

disposition of said land to its great or other irreparable or other injury; denies that complainant is without redress and adequate remedy save by this suit or that this suit is necessary to avoid a multiplicity of actions.

On the contrary this defendant alleges that a suit in ejectment with damages for withholding possession would afford this plaintiff full, complete, speedy and adequate relief in the premises. [34]

IX.

Denies that neither of the defendants nor any person or corporation from whom they or either of them have derived an interest in said land was at the date of said order of withdrawal of September 27, 1909, a *bona fide* occupant or claimant of said land in the diligent prosecution of work leading to a discovery of oil or gas.

X.

Admits the allegations of Paragraph X.

XI.

Denies that said location notice was filed or posted by or for the sole benefit of the defendant J. M. McLeod or for some one else other than the persons whose names were used in said location notice; denies that the said locators were pretended locators or were acting for the benefit of any person, firm or corporation other than themselves; denies that the persons named in said location notice were not *bona fide* locators or that each of them was without interest in said location notice so filed or the land described therein; denies that their names were not used to

enable them or either of them to secure said lands or patent therefor; denies that each of said persons was a mere dummy used for the purpose alleged in Paragraph XI of said bill of complaint.

On the contrary this defendant alleges that it is informed and believes and upon such information and belief states the fact to be that the persons named in Paragraph X of said complaint as locators of the Ohio Placer Mining Claim covering the land described in said bill of complaint, were each citizens of the United States on January 1, 1909, and were on said date associated together in good faith for the purpose of locating said [35] land and acquiring title thereto under and in pursuance of the laws of the United States relating to the sale and disposition of lands commonly known as placers, and that on said date said locators in compliance with said laws duly located said land and then and there and thereby each of them became invested with the title to an undivided one-eighth interest in and to said land; that thereafter said defendant J. M. McLeod became vested by mesne conveyances with the title of said locators and each of them to said land and ever since has been and now is the owner thereof subject to the rights of the defendant therein.

Alleges that this defendant claims no right, title or interest in or to any part of the land described in said complaint except the south half of the northeast quarter and the south half of the north half of the northeast quarter of said Section 28.

XII.

Denies that because of the premises and said bill

of complaint none of the defendants have or ever have had any right, title or interest in or to said land or any part thereof or any right, title or interest in or to the petroleum, mineral, oil or gas deposit therein, or any right to extract petroleum or mineral, oil or gas from said land or to convey or dispose of the petroleum or gas so extracted or any part thereof; denies that the acts of those defendants who have entered upon said land or drilled oil wells or used or appropriated the petroleum or gas deposit therein or assumed to sell or convey any interest in or to any part of said land were either or all in violation of the laws of the United States or of [36] the said order of withdrawal; denies that all or any of said acts were or are in violation of the rights of the plaintiff or that said acts interfered with the execution by plaintiff of its public or other policies with respect to said lands.

On the contrary this defendant alleges that the entry of its predecessors in interest upon said land and its entry thereupon and the development thereof for mineral was pursuant to the invitation and encouragement so to do of the plaintiff by virtue of its long established and continued policy of liberality toward miners and others desiring to develop the mineral lands of the plaintiff and acquire title thereto, which said policy, invitation and encouragement has continuously existed for more than forty years, and had at the time of said location become so well settled and known and has been acted upon by both plaintiff and its citizens for so long as to have be-

come, long before September 27, 1909, and was on said date, a rule of property and was thereafter by Act of Congress approved June 25, 1910, aforesaid, expressly recognized and reiterated by the making of the President's order of temporary withdrawal dated September 27, 1909, wholly inoperative as to the lands described in the bill of complaint in this suit.

Denies that this plaintiff is without full or adequate remedy save in a court of equity or that matters of the nature stated in said bill of complaint are properly cognizable and relievable in a court of equity.

WHEREFORE defendant, Consolidated Mutual Oil Company, having fully answered said bill of complaint, prays that plaintiff take nothing in this case against [37] it and that the defendant be hence dismissed with its costs of suit, and that it be awarded such other and further relief as may appear to be just and equitable.

U. T. CLOTFELTER,

Solicitor for defendant, Consolidated Mutual Oil Company.

[Endorsed]: No. A-41—Equity. Dept. ——. In the District Court of the United States, Southern District of California, Northern Division, Ninth Circuit. United States of America, Plaintiff, vs. Record Oil Company et al., Defendants. Answer of Consolidated Mutual Oil Company. Filed Nov. 20, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Received copy of the within Answer, this 20th day of November, 1915. Albert

Schoonover, U. S. Atty. By M. L., Attorney for Plaintiff. U. T. Clotfelter, 409 Kerckhoff Building, Los Angeles, California, Telephone: Main 2980, Attorney for said Defendant. [38]

In the District Court of the United States in and for the Southern District of California, Northern Division.

No. A-41.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RECORD OIL COMPANY et al.,

Defendants.

Answer of Defendant J. M. McLeod.

Comes now J. M. McLeod, one of the defendants above named and for answer to the bill of complaint filed herein, denies and avers as follows:

I.

Denies that on the 27th day of September, 1909, or for a long time prior thereto, or at any time since said date, plaintiff has been, or now is, entitled to the possession of the petroleum or mineral oil or gas lands particularly described in paragraph II of said complaint, or of the oil, petroleum, gas or other minerals contained in said land.

II.

Denies that the President of the United States on the 27th day of September, 1909, or at any time, withdrew or reserved all or any part of the land in said

complaint described, from mineral exploration or from location, settlement, selection, filing, entry, patent, occupation, or disposal under the mineral or nonmineral laws of the United States; and denies that since said date, or at any time, said lands have not been subject to exploration for mineral oil, petroleum or gas, or to occupation or the institution of any right under the public land laws of the United States. [39]

III.

Denies that, either in violation of the proprietary or any rights of the plaintiff, or in violation of the laws of the United States, or of the lawful orders or proclamations of the President of the United States, or in violation of the order of withdrawal of the 27th of September, 1909, the defendants, or any of them, entered upon said land at any time subsequent to the 27th day of September, 1909, for the purpose of exploring said land for petroleum or gas, but on the contrary alleges the facts with reference to the entry upon and exploration of said lands, to be as hereinafter set forth.

IV.

Denies that the defendants had not acquired any rights on or with respect to said lands, on or prior to September 27, 1909, but, on the contrary, alleges the fact to be that said defendants, and particularly the predecessors in interest and persons under whom this defendant claims, had on the first day of January, 1909, obtained and acquired the exclusive right to occupy and possess said lands, and to explore for

and develop the oil and gas therein, under the mining laws and regulations of the United States, which rights were at all times subsequent thereto, continuously maintained in full force and effect by said predecessors and persons under whom this defendant claims, and by this defendant.

V.

Admits that after the order of withdrawal of September 27, 1909, there was produced petroleum and gas from said lands, but denies that any entry upon said land for the purpose of producing said petroleum or gas was made subsequent to September 27, 1909; on the contrary this defendant alleges the fact to be that such entry was made thereon in conformity with the mining laws and [40] regulations of the United States long prior to said September 27, 1909, and that on said last-mentioned date there was in existence and in full force and effect a valid and subsisting location of said land made under the Placer Mining Laws and Regulations of the United States, being the same location referred to in paragraph X of said complaint and designated as the Ohio Placer Mining Claim, and that on said 27th day of September, 1909, and at all times prior thereto, from the date of the making of said location, said locators, and those claiming through them, were in the actual and *bona fide* occupation and possession of said lands, actually engaged in the diligent prosecution of work thereon looking to the discovery of oil or gas therein, which work was continued diligently and in good faith until such discovery, and thereafter.

VI.

Denies that the defendants or any of them, and particularly this defendant, are trespassing upon said land or any part thereof; denies that any oil or gas is being wrongfully sold or converted, or has at any time been wrongfully taken, sold or converted by any of the defendants from said land or any part thereof; denies that any trespassing or waste has been or will be committed on said land or any part thereof, either to the irreparable or any injury of plaintiff.

VII.

Alleges that he is not advised as to the policies of plaintiff with respect to the conservation, use or disposition of said land referred to in paragraph VII of said complaint, or of the petroleum or gas contained therein, except as such policies are indicated by the mining laws and regulations of the complainant, and as to such laws and regulations, this defendant and those through and under whom he claims said land, have in all respects and at all times fully complied with such laws and regulations. [41]

VIII.

This defendant denies that he is *now or* at any time for more than two years last past, has produced any oil, petroleum or gas or other material whatsoever from said land, but on the contrary alleges the fact to be that for said period of more than two years the land described in said complaint has not produced any oil, petroleum or gas whatsoever.

IX.

This defendant alleges that in the year 1910, by

agreement and contract with the locators of the land described in the bill of complaint, and persons claiming through said locators, it acquired the right to the possession and occupancy of the land described in the bill of complaint; that at all times from and after the first day of January, 1909, said locators and persons claiming through them, were in continuous, diligent and *bona fide* pursuit of work leading to and which did ultimately lead to the discovery of oil in said land; and that ever since the time of said agreements, this defendant has been continuously in the actual, *bona fide* possession and occupancy of the land described in the complaint, and the whole thereof, and in the diligent pursuit of work leading to and which did lead to the discovery of oil therein; this defendant denies that his claim to said land is derived directly or otherwise from any pretended notice or notices of mining locations, or by conveyances, contracts or liens, directly or otherwise, from any pretended location, but on the contrary alleges the fact to be that his claim is based upon an actual, valid, *bona fide* and existing location made on the first day of January, 1909, and duly and regularly maintained in full force and effect at all times from and after said date.

X.

Denies that none of the defendants nor any person or corporation from whom they have derived any interest in said lands, [42] was on the date of the order of withdrawal of the 27th day of September, 1909, a *bona fide* occupant or claimant of said lands, or in the diligent prosecution of work leading

to the discovery of oil or gas therein, but on the contrary alleges the fact to be that said locators and the persons claiming through and under them as aforesaid, were on said 27th day of September, 1909, and at all times from and after January 1, 1909, in the *bona fide* occupancy of said land, claiming the same in good faith, and in the diligent prosecution of work thereon leading to the discovery of oil or gas therein.

XI.

Denies that the location notice referred to in paragraph XI of the complaint, was filed or posted by or for the sole or any benefit of this defendant, or for the benefit of any person whomsoever other than the persons whose names were used in said location notice; denies that the names of said locators or any of them were used to acquire more than twenty acres of mineral land in violation of the laws of the United States; denies that the persons whose names were used in said location notice or any of them were not *bona fide* locators, or that any of said persons was without any interest in said location notice; avers that the names of said locators and each of them, were used to enable said persons and each of them to secure the land described in said location notice, and patent therefor; denies that any of said persons was a dummy, but on the contrary alleges the fact to be that said location was made by the persons named therein and specified in said bill of complaint, in good faith, by and for the mutual benefit of said locators, and in all respects in conformity with the mining laws and regulations of the United States.

XII.

Denies that the defendants have no right, title or interest in or to said land or any part thereof, or any right, [43] title or interest in or to the petroleum, mineral oil or gas deposited therein, or any right to extract the petroleum or mineral oil or gas from said land, or to convey or dispose of the petroleum or gas so extracted, but on the contrary alleges the fact to be that by virtue of the mineral location aforesaid, and of agreements and conveyances from the locators therein named, and those claiming under and through them, and by virtue of compliance with the mining laws and regulations of the United States, this defendant is lawfully entitled to the possession of the northeast quarter of Section 28, township 31 south, range 23 east, M. D. M., and to the minerals therein contained, and to any and all proceeds of such minerals.

XIII.

That the matters in issue therein, are not properly or at all matters of equity jurisdiction; that this action was improperly commenced in equity, and should have been brought as an action at law.

WHEREFORE, this defendant prays that this cause be transferred to the law side of the court and there proceeded with in accordance with the law and practice in actions at law;

That this defendant be hence dismissed, and for his costs.

OSCAR LAWLER,
Solicitor for Defendant J. M. McLeod.

[Endorsed]: No. A-41. District Court of the United States, Southern District of California, Northern Division. United States of America, Plaintiff, vs. Record Oil Company, et al., Defendants. Answer of Defendant, J. M. McLeod. Received Copy of the Within Answer this 28th Day of December, 1915. Albert Schoonover, U. S. Atty., L., Attorney for Plaintiff. Filed Dec. 28, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Oscar Lawler, Attorney-at-law, 524-527 Security Building, Phones A-2268, Main 2403, Solicitor for J. M. McLeod. [44]

In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit.

A-41.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RECORD OIL COMPANY, CONSOLIDATED
MUTUAL OIL COMPANY, MAYS CON-
SOLIDATED OIL COMPANY, J. M. Mc-
LEOD, LOUIS TITUS, NORTH AMERI-
CAN OIL CONSOLIDATED, STANDARD
OIL COMPANY, GENERAL PETRO-
LEUM COMPANY, ASSOCIATED OIL
COMPANY, and L. B. McMURTRY,

Defendants.

Notice of Motion for Restraining Order and Receiver.

To Record Oil Company, Consolidated Mutual Oil Company, Mays Consolidated Oil Company, J. M. McLeod, Louis Titus, North American Oil Consolidated, Standard Oil Company, General Petroleum Company, Associated Oil Company, and L. B. McMurtry:

You, and each of you, will take notice that the plaintiff, the United States of America, will move before the United States District Court for the Southern District of California, and the Judge thereof, M. T. Dooling, United States District Judge, at the courtroom of the said Court in the Federal Building, at Los Angeles, California, on the 30th day of November, 1915, at 10 o' clock, A. M., in the above-entitled cause, for the granting of an order restraining you, and each of you, your officers, agents, servants, and attorneys, from taking or moving from the said premises [45] described in the bill of complaint herein, any of the mineral oil or petroleum deposited therein, or any of the gas in or under said land, and from committing in any manner any trespass or waste upon any of said land, or with reference to any of the minerals deposited therein, pending the disposition of the said cause or the further order of this Court.

And you and each of you will further take notice that the plaintiff, the United States of America, will then and there move the said Court and the Judge thereof in the above-entitled cause for the

granting of an order appointing a receiver for the property described in the bill of complaint herein, and operated by you and each of you, and for the oil and petroleum heretofore extracted from said land, to be dealt with by the receiver in such manner as to the Court may seem proper.

The above motions will be submitted upon the verified bill of complaint on file herein, affidavits, records, documents and oral testimony.

This, the 23d day of November, 1915.

E. J. JUSTICE,

FRANK HALL,

Solicitors for the Plaintiff, United States of America. [46]

A-41.

Return on Service of Writ.

United States of America,
Southern District of California,—ss.

I hereby certify and return that I served the annexed Notice of Motion for Restraining Order and Receiver on the therein-named Oscar Lawler, by handing to and leaving a true, and correct copy thereof with the clerk in the office of the above-named personally at Los Angeles, California, in said District, on the 24th day of November, A. D. 1915.

C. T. WALTON,

U. S. Marshal,

By F. G. Thompson,

Deputy.

A-41.

RETURN ON SERVICE OF WRIT.

United States of America,
Southern District of California,—ss.

I hereby certify and return that I served the annexed Notice of Motion for Restraining Order and Receiver on the therein-named U. T. Clotfelter by handing to and leaving a true and correct copy thereof with U. T. Clotfelter, personally at Los Angeles, California, in said District on the 24th day of November, A. D. 1915.

C. T. WALTON,
U. S. Marshal,
By F. G. Thompson,
Deputy.

[Endorsed]: No. A-41. In the District Court of the United States for the Southern District of California. United States [47] of America, Plaintiff, vs. Record Oil Company et al., Defendants. Notice of Motion for Restraining Order and Receiver. Filed Dec. 1, 1915. Wm. M. Van Dyke, Clerk. T. F. Green, Deputy. [48]

*In the District Court of the United States, for the
Southern District of California, Northern Division,
Ninth Circuit.*

A-41.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RECORD OIL COMPANY, CONSOLIDATED
MUTUAL OIL COMPANY, MAYS CON-
SOLIDATED OIL COMPANY, J. M. Mc-
LEOD, LOUIS TITUS, NORTH AMERI-
CAN OIL CONSOLIDATED, STANDARD
OIL COMPANY, GENERAL PETRO-
LEUM COMPANY, ASSOCIATED OIL
COMPANY, and L. B. McMURTRY,

Defendants.

**Notice of Motion for Restraining Order and
Receiver.**

To Record Oil Company, Consolidated Mutual Oil
Company, Mays Consolidated Oil Company,
J. M. McLeod, Louis Titus, North American
Oil Consolidated, Standard Oil Company, Gen-
eral Petroleum Company, Associated Oil Com-
pany, and L. B. McMurtry:

You, and each of you, will take notice that the
plaintiff, the United States of America, will move
before the United States District Court for the
Southern District of California, and the Judge
thereof, M. T. Dooling, United States District Judge,
at the courtroom of the said Court in the Federal

Building, at Los Angeles, California, on the 30th day of November, 1915, at 10 o' clock, A. M., in the above-entitled cause, for the granting of an order restraining you, and each of you, your officers, agents, servants, and attorneys, from taking or moving from the said premises [49] described in the bill of complaint herein, any of the mineral oil or petroleum deposited therein, or any of the gas in or under said land, and from committing in any manner any trespass or waste upon any of said land, or with reference to any of the minerals deposited therein, pending the disposition of the said cause or the further order of this Court.

And you and each of you will further take notice that the plaintiff, the United States of America, will then and there move the said Court and the Judge thereof in the above-entitled cause for the granting of an order appointing a receiver for the property described in the bill of complaint herein, and operated by you and each of you, and for the oil and petroleum heretofore extracted from said land, to be dealt with by the receiver in such manner as to the Court may seem proper.

The above motions will be submitted upon the verified bill of complaint on file herein, affidavits, records, documents and oral testimony.

This, the 23d day of November, 1915.

E. J. JUSTICE,
FRANK HALL,

Solicitors for the Plaintiff, United States of
America. [50]

RETURN ON SERVICE OF WRIT.

United States of America,
Northern District of California,—ss.

I hereby certify and return that I served the annexed Notice of Motion for Restraining Order, etc., on the therein-named A. L. Weil, Pillsbury, Madison & Sutro, and Edmund Tauszky, by handing to and leaving a true and correct copy thereof with A. L. Weil, Oscar Sutro, member of firm of Pillsbury, Madison & Sutro, and Edmund Tauszky, personally, at San Francisco, California, in said District on the 24th day of November, A. D., 1915.

J. B. HOLOHAN,
U. S. Marshal,
By J. W. Jessen,
Office Deputy.

[Endorsed]: No. A-41. In the District Court of the United States for the Southern District of California. United States of America, Plaintiff, vs. Record Oil Company et al., Defendants. Notice of Motion for Restraining Order and Receiver. Filed Dec. 6, 1915. Wm. M. Van Dyke. By T. F. Green, Deputy Clerk. [51]

At a stated term, to wit, the Special October Term, A. D. 1915, of the District Court of the United States of America, in and for the Southern District of California, Northern Division, held at the courtroom thereof, in the City of Los Angeles, on Monday, the twenty-ninth day of November,

in the year of our Lord, one thousand nine hundred and fifteen. Present: The Honorable M. T. DOOLING, District Judge.

No. A-41—EQUITY.

THE UNITED STATES OF AMERICA,

Complainants,

vs.

RECORD OIL COMPANY et al.,

Defendants.

Minutes of Court—November 29, 1915.

At the hour of 2 o'clock, P. M., on motion and by consent, it is ordered that this cause be, and the same hereby is submitted to the Court for its consideration and decision on applications for appointment of receiver upon affidavits to be served and filed as follows, to wit: On behalf of complainants within ten (10) days after December 1st, 1915, and on behalf of all defendants served within ten days thereafter, complainants and defendants to have five (5) days after the expiration of the time for filing affidavits within which to submit briefs and points and authorities herein, if they so elect, and it is further ordered that the service of all copies of affidavits shall be by mail; and this cause having thereupon been called for hearing on the motions of defendant, Associated Oil Company, to dismiss the bill of complaint as to said defendant, to set aside service of subpoena ad respondendum on said [52] defendant, to dismiss the bill of complaint, and to transfer this cause to the law side of the docket; and said motions having been argued, in support thereof, by Edmund Tauszky,

Esq., of counsel for said defendant, Associated Oil Company, and in opposition thereto by Frank Hall, Esq., Special Assistant to the U. S. Attorney General, of counsel for the United States; it is ordered that this cause be, and the same hereby is submitted to the Court for its consideration and decision on said motions to dismiss and on the motion to set aside service on said defendant, Associated Oil Company, and on said motion to transfer this cause to the law side of the docket, upon the argument thereof, and upon the argument had and briefs filed in the United States Circuit Court of Appeals for the Ninth Circuit in the appeal of defendant, Eldora Oil Company, in the cause in this court entitled *The United States of America, Complainants, vs. Midway Northern Oil Company, et al., Defendants*, No. 47—Civil, Northern Division; and it is further ordered that defendant, Associated Oil Company may have ten (10) days after the ruling of the Court on said motions to dismiss the bill of complaint and motion to transfer this cause to the law side of the docket, and after the receipt of advice from the clerk of this court as to said ruling, if such ruling shall be adverse to said defendants, within which to file answer to the bill of complaint in this cause. [53]

At a stated term, to wit, the Special October Term, A. D. 1915, of the District Court of the United States of America, in and for the Southern District of California, Northern Division, held at the courtroom thereof, in the City of Los Angeles, on Tuesday, the thirtieth day of November, in the year of our Lord, one thousand nine hundred and fifteen. Present: The Honorable M. T. DOOLING, District Judge.

No. A-41—EQUITY.

THE UNITED STATES OF AMERICA,

Complainants,

vs.

RECORD OIL COMPANY et al.,

Defendants.

Minutes of Court—November 13, 1915.

On motion of Frank Hall, Esq., Special Assistant to the U. S. Attorney General, of counsel for the United States, it is ordered that the order heretofore made and entered herein submitting this cause upon applications for receiver be, and the same hereby is amended, by providing that, in addition to the affidavits to be served and filed, this cause also stand submitted as to said applications for receiver upon the verified pleadings filed in this cause. [54]

*In the District Court of the United States, for the
Southern District of California, Northern
Division.*

No. A-41—EQUITY.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

RECORD OIL CO. et al.,
Defendants.

**Order Granting Application for Appointment of
Receiver, etc., in Equity Case, A-41.**

ALBERT SCHOONOVER, Esq., United States
Attorney, E. J. JUSTICE, Esq., A. E.
CAMPBELL, Esq., and FRANK HALL,
Esq., Special Assistants to the Attorney
General, Attorneys for the Plaintiff.

OSCAR LAWLER, Esq., Attorney for J. M.
McLeod and Record Oil Co., A. L. WEIL,
Esq., Attorney for General Petroleum Co.

For the reasons given in U. S. vs. Consolidated
Midway Oil Co., et al., No. A-2—Equity and U. S.
vs. Thirty Two Oil Co., et al., No. A-38—Equity,
this day decided, the application for the appoint-
ment of a receiver is granted, and the motions to
transfer to the law side, to dismiss, to strike out and
for further and better particulars are denied.

February 1st, 1916.

M. T. DOOLING,
Judge.

[Endorsed]: No. A-41—Equity. U. S. District Court, Southern District of California, Northern Division. The United States of America, Plaintiff, vs. Record Oil Co., et al., Defendants. Order Granting Application for Appointment of Receiver, and Denying Motions to Transfer to Law Side, to Dismiss, to Strike Out and for Further and Better Particulars. Filed Feb. 3, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [55]

*In the District Court of the United States, for the
Southern District of California, Northern
Division.*

No. A-2—EQUITY.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

CONSOLIDATED MIDWAY OIL CO. et al.,
Defendants.

**Order Denying Motions to Transfer Case from
Equity to Law Side of Court, etc.**

ALBERT SCHOONOVER, Esq., United States Attorney, E. J. JUSTICE, Esq., A. E. CAMPBELL, Esq., and FRANK HALL, Esq., Special Assistants to the Attorney General, Attorneys for the Plaintiff.

GEO. E. WHITAKER, Esq., Attorney for Midnight Oil Co., Edith F. Coons and National Pacific Oil Co., M. S. PLATZ, Esq., Attorney for Mary F. Francis, HUNSAKER & BRITT, Attorneys for Citizens National

Bank, L. C. GATES, Esq., Attorney for Title Insurance & Trust Co., FLINT & JUTTEN, Attorneys for California National Supply Co., OSCAR LAWLER, Esq., Attorney for Four Investment Co., PILLSBURY, MADISON & SUTRO, Attorneys for Standard Oil Co., J. P. SWEENEY, Esq., Attorney for Maricopa Oil Co.

As in a number of other cases submitted at the same time, a motion is presented to transfer this case from the Equity to the Law side of the Court. The several grounds of the motion fall generally under one of the following heads:

1. That a plain, adequate and complete remedy may be had at law in an action in ejectment. [56]

2. That the present action is in effect one in ejectment and must be tried on the law side where the parties are entitled to a jury trial.

My conclusions as to these contentions, which a press of other matters does not afford me time to do more than state without elaboration, are as follows:

1. That ejectment does not afford a plain, adequate and complete remedy for the matters complained of in the bill of complaint herein.

2. That neither in form nor in substance is the action one in ejectment. Its purpose is the prevention of waste—to restrain the defendants from withdrawing the oil from the lands in question. All other matters embraced in the bill are subordinate to this. Whether the defendants, by maintaining derricks and other structures on the lands, retain such possession as they may have acquired as

against the Government, is of minor importance under the averments of the bill, so long as they do not destroy the real value and substance of the lands by withdrawing the oil therefrom before their right to do so shall have been finally determined.

It is not upon this motion decided whether such right should be finally determined by the land department or by the Court.

The motion to transfer is therefore denied. The motions to dismiss, to make more certain and to strike out are also denied.

February 1st, 1916.

M. T. DOOLING,
Judge. [57]

[Endorsed]: No. A-2—Equity. U. S. District Court, Southern District of California, Northern Division. The United States of America, Plaintiff, vs. Consolidated Midway Oil Co. et al., Defendant. Opinion and Order Denying Motions to Transfer to Law Side, to Dismiss, to Make More Certain and to Strike Out. Filed Feb. 3, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [58]

*In the District Court of the United States, for the
Southern District of California, Northern
Division.*

No. A-38—EQUITY.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

THIRTY TWO OIL CO. et al.,

Defendants.

**Order Granting Application for Appointment of
Receiver, etc., in Equity Case No. A-38.**

ALBERT SCHOONOVER, Esq., United States Attorney, E. J. JUSTICE, Esq., A. E. CAMPBELL, Esq., and FRANK HALL, Esq., Special Assistants to the Attorney General, Attorneys for the Plaintiff.

EDMUND TAUSZKY, Esq., Attorney for Associated Oil Co., HUNSAKER & BRITT, Attorneys for Thirty Two Oil Co. and J. M. McLeod, OSCAR LAWLER, Esq., Attorney for Buick Oil Co., GEO. E. WHITAKER, Esq., Attorney for California Midway Oil Co.

As in a number of other cases submitted at the same time complainant moves for an injunction, and the appointment of a receiver. In my judgment the present status of the property in these cases should be maintained, either by enjoining the withdrawal of oil, or by the appointment of a receiver, until the right of defendants to withdraw oil from the land is finally determined either by the land department or by the Court. It seems to me that the appointment of a receiver will work less hardship to defendants than the granting of an injunction. For this reason the application for the appointment of a receiver is granted. The motions to dismiss, to strike out, and make more certain and to transfer to the law side are denied.

February 1st, 1916.

M. T. DOOLING,
Judge. [59]

[Endorsed]: No. A-38—Equity. U. S. District Court, Southern District of California, Northern Division. The United States of America, Plaintiff, vs. Thirty Two Oil Co. et al., Defendants. Opinion and Order Granting Application for Appointment of Receiver, and denying Motions to Dismiss, to Strike Out, to Make More Certain and to Transfer to Law Side. Filed Feb. 3, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.
[60]

*In the District Court of the United States, for the
Southern District of California, Northern
Division, Ninth Circuit.*

No. A-41—IN EQUITY.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RECORD OIL COMPANY, CONSOLIDATED
MUTUAL OIL COMPANY, MAYS CON-
SOLIDATED OIL COMPANY, J. M. Mc-
LEOD, LOUIS TITUS, NORTH AMERI-
CAN OIL CONSOLIDATED, STANDARD
OIL COMPANY, GENERAL PETROLEUM
COMPANY, ASSOCIATED OIL COM-
PANY, and L. B. McMURTRY,

Defendants.

Order Appointing Receiver.

This suit coming on to be heard on motion of the complainant for the appointment of a receiver and

for an injunction, and having been heard on the 30th day of November, 1915,

IT IS NOW CONSIDERED, ORDERED AND ADJUDGED that HOWARD M. PAYNE be, and he is hereby, appointed receiver of all the property described in the Bill of Complaint herein claimed by the defendants, to wit:

The Northeast quarter of Section Twenty-eight, (28), Township Thirty-one (31) South, Range Twenty-three (23) East, Mount Diablo Base and Meridian, and situated in Kern County, State of California,

and of the oil, gas, and all other property of every kind now situated on the said land, or already extracted therefrom, and still in the possession of defendants; and the defendants, [61] and each of them, their agents, attorneys and employees, are enjoined from removing said oil, gas, or other property, or any part thereof, from said land, or in any manner interfering with the order of this Court, and are enjoined from further producing oil from said land, except by permission and under the direction of the said receiver.

Said receiver is directed to receive, and the said defendants are directed to surrender to said receiver all moneys in their hands or in the hands of any person or corporation for them, which are the proceeds of the sale of oil or gas produced from said lands hereinbefore described, and such persons holding such funds are directed to pay same to said receiver; and the said receiver is directed to collect any notes, accounts, or other evidences of debt due or payable

on account of oil and gas produced from said land and sold by or for said defendants, or any of them.

The said receiver is given power and directed to operate any oil or gas well or wells on said property, or to permit them to be operated by the respective defendants now in possession of or operating same, or who have heretofore operated on said lands; or to close said wells, if he deems it necessary or advisable to do so in order to conserve the oil and gas in said lands and prevent said property from being damaged or the oil and gas from being wasted.

The said receiver is directed to ascertain the quantity of oil and gas heretofore extracted by said respective defendants, and what disposition has been made thereof, and keep an account thereof, and to keep an accurate account of all oil and gas hereafter produced from said lands, and to sell said oil and gas for the best price obtainable. [62]

For the purpose of making an investigation and determining the condition of wells drilled on said lands, and particularly for the purpose of determining whether water is infiltrating the oil sands or reservoirs on said lands, and for the further purpose of ascertaining the amount of oil and gas heretofore produced, the price at which the same has been sold, and the value thereof, the receiver is directed and empowered to examine the logs of the wells and the books of account kept by the defendants or any of them in the development and operation of said lands.

For the purpose of preventing damage to said lands by the infiltration of water into the oil sands

and otherwise, and for the purpose of protecting and operating the said property and carrying out the provisions of this order, the said receiver is authorized to employ such assistants and incur such expense, to be paid out of the moneys coming into his hands as receiver, as he shall deem necessary, subject to the approval of this Court.

A bond in the sum of Ten Thousand (10,000) Dollars, to be approved by this Court, shall be given by the receiver within fifteen days from the filing of this order; provided the solicitor for the complainant or for the defendants, or either of them, may at any time upon one day's notice to counsel for the opposite parties, apply to the Court for an increase in the amount of said bond.

The moneys coming into the hands of the said receiver shall, unless otherwise directed by the Court, be deposited in a bank or banks in special interest-bearing accounts in the joint name of the receiver and the clerk of this court, and subject to the joint check and control of such persons, except so much of said funds as may be [63] necessary to pay the monthly current expenses of the receiver in executing the orders of this Court, and such sums as may be necessary for such purposes shall be deposited in a bank or banks, to the credit of such receiver, as receiver for the respective defendants, and shall be subject to the receiver's check.

The amount of compensation to be paid to the receiver in this suit is to be determined hereafter.

This 2 day of February, 1916.

M. T. DOOLING,
United States District Judge.

[Endorsed]: No. A-41. In the District Court of the United States for the Southern District of California, Northern Div., Ninth Circuit. United States of America, Plaintiff, vs. Record Oil Company et al., Defendants. Order Appointing Receiver. Filed Feb. 3, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [64]

*In the District Court of the United States, for the
Southern District of California, Northern
Division, Ninth Circuit.*

No. A-41—EQUITY.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RECORD OIL COMPANY, CONSOLIDATED
MUTUAL OIL COMPANY, MAYS CON-
SOLIDATED OIL COMPANY, J. M. Mc-
LEOD, LOUIS TITUS, NORTH AMERI-
CAN OIL CONSOLIDATED, STANDARD
OIL COMPANY, GENERAL PETROLEUM
COMPANY, ASSOCIATED OIL COM-
PANY, and L. B. McMURTRY,

Defendants.

**Notice of Lodgment of Statement of Evidence on
Appeal.**

To the United States of America, Plaintiff Above-
Named, and to E. J. Justice, Esq., Albert
Schoonover, Esq., A. E. Campbell, Esq., and
Frank Hall, Esq., Solicitors for said Plaintiff:

PLEASE TAKE NOTICE that on the 15th day of March, 1916, defendants and appellants, J. M. McLeod and Consolidated Mutual Oil Company, lodged with the clerk of the above-entitled court their statement of evidence to be included in Transcript on Appeal; and that on the 25th day of March, 1916, said defendants and appellants will ask the Court or Judge to approve said statement of evidence.

Dated: March 15th, 1916.

OSCAR LAWLER,

Solicitor for Defendant and Appellant J. M. McLeod.

U. T. CLOTFELTER,

A. L. WEIL,

CHARLES S. WHEELER and

JOHN F. BOWIE,

Solicitors for Defendant and Appellant, Consolidated Mutual Oil Co. [65]

Due service and receipt of a copy of the within Notice of Lodgment of Statement, also copy of Statement of Evidence, this 15th day of March, 1916, is hereby admitted.

E. J. JUSTICE,

ALBERT SCHOONOVER,

A. E. CAMPBELL,

FRANK HALL,

Attorneys for _____.

[Endorsed]: No. A-41—Equity. In the United States District Court for the Southern District of California. United States of America, Plaintiff, vs. Record Oil Company et al., Defendants. Notice of Lodgment of Statement of Evidence to be Included in Transcript on Appeal. Filed Mar. 16, 1916. Wm.

M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Charles S. Wheeler, Attorney for Defendant, Cons. Mutual Oil Co., Union Trust Building, San Francisco. [66]

In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit.

No. A-41—EQUITY.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RECORD OIL COMPANY, CONSOLIDATED
MUTUAL OIL COMPANY, MAYS CON-
SOLIDATED OIL COMPANY, J. M. Mc-
LEOD, LOUIS TITUS, NORTH AMER-
ICAN OIL CONSOLIDATED, STAND-
ARD OIL COMPANY, GENERAL PETRO-
LEUM COMPANY, ASSOCIATED OIL
COMPANY, and L. B. McMURTRY,

Defendants.

**Statement of Evidence to be Included in Transcript
on Appeal.**

The motion for the appointment of a receiver was heard and determined upon the foregoing complaint and answers and upon the following affidavits:

1. AFFIDAVITS OFFERED BY PLAINTIFF:

[67]

Affidavit of E. W. Bailey.

State of California,
County of Kern,—ss.

E. W. Bailey, being first duly sworn, deposes and says:

That he is a citizen of the United States and over the age of 21 years, and that his postoffice address is Taft, California.

That early in the spring of 1909 he assumed the position of superintendent of the Mays Oil Company, now known as the Mays Consolidated Oil Company. That the derrick for well No. 1 on the SW. $\frac{1}{4}$ of Section 28, Township 31 South, Range 23 E., M. D. M., was erected a short time after he went to work for the Mays Oil Company, and probably about May, 1909, and that about the same time the said derrick on the SW. $\frac{1}{4}$ of Section 28, was erected, skeleton derricks were also erected on the NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of said Section 28, T. 31 S., R. 23 E., one skeleton derrick being erected on each of said quarter sections; that these skeleton derricks were all erected near the center of said Section 28, and that all of them were in plain sight from and within a short distance of well No. 1 on the SW. $\frac{1}{4}$ of said Section 28. That he is unable to state the exact time these skeleton derricks on the NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$, Section 28, T. 31 S., R. 23 E. were erected, but that they were constructed after he assumed the position of superintendent for the Mays Oil Co., which was in the early spring of 1909, and between

that time and the time drilling was started on Mays No. 1 well on the SW. $\frac{1}{4}$ of Section 28, which said drilling commenced about August, or September, 1909; that he is positive these skeleton derricks on the said NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$, Section 28, T. 31 S., R. 23 E. were completed before drilling commenced on well No. 1 on the SW. $\frac{1}{4}$ of said Section 28, which, as heretofore stated, was about August or September, 1909. [68]

Affiant further states that some time during the summer of 1909, and prior to the time drilling commenced on well No. 1 on the SW. $\frac{1}{4}$ of said Section 28, which was about August or September, 1909, a bunk-house about 12x20 feet in size was erected on the NW. $\frac{1}{4}$ of said Section 28, and a cook-house, about 20x30 feet in size, was erected on the said NE. $\frac{1}{4}$ of said Section 28; and that to the best of his recollection at this time, the work of building said bunk-house and cook-house did not require, altogether, more than about 15 days' time.

Affiant further states that he was employed as field superintendent of the Mays Oil Company from early in the spring of 1909 to about some time in November, 1909, and that during said period he was in direct charge of the work of said company on said Section 28, T. 31 S., R. 23 E., and was over and upon said section practically every day during said period from the spring of 1909 to November, 1909; and that if any work had been performed on the NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ or SE. $\frac{1}{4}$ of said Section 28 during said period last above mentioned, he would have known of it

and would have observed evidences of it. That no work was done or performed on said NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ or SE. $\frac{1}{4}$ of said Section 28, T. 31 S., R. 23 E., during the said period, from the spring of 1909 to November, 1909, other than is hereinbefore set out, except that some time during the summer of 1909 he recalls that some sagebrush was cleared away from the land around the three skeleton derricks on the NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of said Section 28; and that when this affiant left the employ of the Mays Oil Co. in November, 1909, the only improvements on the said NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ and SE. $\frac{1}{4}$, Section 28, T. 31 S., R. 23 E. consisted of a skeleton derrick on each of said three quarter-sections, together with a bunk-house on the NW. $\frac{1}{4}$ and a cook-house on the NE. $\frac{1}{4}$ of said section. [69]

That affiant resumed work with the Mays Oil Co. as field superintendent in January or February, 1910, and was in charge of said company's work on Section 28, T. 31 S., R. 23 E. from that time until about August, 1910; that upon his return to work for said company on said Section 28 in January, or February, 1910, he observed the condition of said NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ and SE. $\frac{1}{4}$, Section 28, T. 31 S., R. 23 E., and found that the improvements then upon the said last above-described lands were the same as when he left the employ of said Mays Oil Co. in November, 1909, to wit: a skeleton derrick on each of said three quarter sections, a bunk-house on the NW. $\frac{1}{4}$, and a cook-house on the NE. $\frac{1}{4}$ of said Section 28.

That after returning to work for the Mays Oil Company on said Section 28 in January or February,

1910, a new skeleton derrick was erected on the NE. $\frac{1}{4}$ of Section 28, which work was done and performed under his supervision; that he is unable to state just when this new skeleton derrick was erected, but that the work of building the same, to the best of his recollection at this time, did not require more than four or five days' time. Affiant further states that some time in June, 1910, the cellar at the derrick on the NE. $\frac{1}{4}$ of said Section 28 was dug under his supervision, and that the digging of this cellar, to the best of his recollection at this time, required about four days' time.

Affiant further states that after returning to work for the Mays Oil Co. in January or February, 1910, the skeleton derrick on the NW. $\frac{1}{4}$ of said Section 28, was timbered up under his supervision, that is to say, the derrick was completed as a standard derrick, ready for standard drilling, with engine-house, belt-house, bull-wheel, calf-wheel, etc.; that he is unable to state [70] at this time just when this work on the said NW. $\frac{1}{4}$, Section 28, as aforesaid, was performed, but to the best of his recollection at this time the rigging up of this said derrick required about five days' time.

Affiant further states that up to the time he left the employ of the Mays Oil Company, which was about August, 1910, boilers, engines, or tools had not been placed or installed at the derricks on either the NE. $\frac{1}{4}$, NW. $\frac{1}{4}$, or SE. $\frac{1}{4}$, of Section 28, T. 31 S., R. 23 E., and that no drilling work of any kind or character had been performed upon said three quar-

ter-sections, namely, the NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ or SE. $\frac{1}{4}$, Section 28, T. 31 S., R. 23 E., prior to the time he left the employ of the Mays Oil Company, which was about August, 1910; and that up to that time, namely, August, 1910, no discovery of oil or gas had been made upon either the NE. $\frac{1}{4}$, the NW. $\frac{1}{4}$ or the SE. $\frac{1}{4}$ of said Section 28, T. 31 S., R. 23 E. That he was over and upon said Section 28, T. 31 S., R. 23 E. practically every day from about January or February, 1910, to about August, 1910, and that if any work had been performed on the NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ or SE. $\frac{1}{4}$ of said Section 28, during said period, other than the work hereinbefore set out, he would have known of it, and that no work in addition to that hereinbefore described, was done or performed on said lands during said period, namely, from January or February, 1910, to about August, 1910.

Affiant further states that for the past seven years he has been working in and around the oil fields of Kern County, California, and that he has supervised the construction of numerous skeleton derricks such as were placed on the lands in question herein, namely, the skeleton derricks that were [71] erected on the NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ and SE. $\frac{1}{4}$, Section 28, T. 31 S., R. 23 E., and that he has also observed the building of numerous such skeleton derricks; that it has been his experience and observation that a skeleton derrick such as was erected on each of the three quarter-sections above described, namely, the NE. $\frac{1}{4}$, NW. $\frac{1}{4}$, and SE. $\frac{1}{4}$ of Section 28, T. 31 S., R. 23 E., can, under ordinary circumstances, be constructed in about four days' time.

That by the term "skeleton derrick" as used in this affidavit, he means the bare skeleton of the derrick, without any engine-house, belt-house, bull-wheel, or calf-wheel.

E. W. BAILEY.

Subscribed and sworn to before me at Taft, California, this 7th day of December, 1915.

[Seal]

R. B. WHITTEMORE,

Notary Public. [72]

Affidavit of O. L. Goode.

State of California,
County of Kern,—ss.

O. L. Goode, being first duly sworn, deposes and says:

That he is a citizen of the United States and over the age of 21 years, and that his postoffice address is Taft, California.

That from August, 1909, to July or August, 1910, he was engaged driving teams and hauling for his brother, O. P. Goode; and that during the period mentioned, namely, from August, 1909, to July or August, 1910, he hauled oil with said O. P. Goode's teams from what was then known as the Hawaiian lease, about one-half mile west of Fellows, California, to Mays No. 1 well on Section 28, Township 31 South, Range 23 E., M. D. M.

That affiant is not familiar with the location of the four quarter-sections of said Section 28, and is unable to state of his own knowledge the particular quarter-section of said section upon which the well above mentioned, and known as Mays No. 1 well, is

situated, but that during the period above mentioned, namely, from August, 1909, to July or August, 1910, no other wells were being drilled, and no drilling work of any kind or character was being performed upon any land within a radius of less than one and one-half miles from the location of the well that was known as Mays No. 1 well on Section 28, T. 31 S., R. 23 E.

That during the entire period from August, 1909, to July or August, 1910, this affiant was to Mays No. 1 well on Section 28 on an average of twice each week, and by reason of such visits to and upon the said land was in a position to observe whether or not any other drilling work was being done on lands in the vicinity of the well known as Mays No. 1 well; and that [73] if any drilling work had been done on said Section 28, or within a radius of one and one-half miles of the well known as Mays No. 1 well, during said period, namely, from August, 1909, to July or August, 1910, he would have known of it.

That at the time this affiant first began hauling oil to Mays No. 1 well, which was in August, 1909, there were situated within a short distance of said Mays No. 1 well three skeleton derricks. That this affiant is unable to state when these skeleton derricks were erected, but that the said three derricks were completed and standing upon the land at the time he first visited the location of Mays No. 1 well on Section 28, in August, 1909.

That during the time this affiant was hauling oil to the well known as Mays No. 1 well on said Section 28, which was from August, 1909, to July or August,

1910, no drilling work of any kind or character was being done or performed at the locations of the three skeleton derricks that were situated near the well known as Mays No. 1 well on Section 28, as aforesaid, or at any of them, and that the only drilling work that was being carried on in the vicinity of said Mays No. 1 well on Section 28, during the period from August, 1909, to July or August, 1910, was the drilling work on the said Mays No. 1 well.

O. L. GOODE.

Subscribed and sworn to before me this 6th day of December, 1915, at Taft, California.

[Seal]

R. B. WHITTEMORE,

Notary Public. [74]

Affidavit of Silas L. Gillan.

United States of America,
Northern District of California,
State of California,—ss.

Silas L. Gillan, being duly sworn on oath, deposes and says:

I am a citizen of the United States over the age of 21 years. I am a graduate mining engineer and during most of the period of the last five years I have been engaged in the California oil fields as a mineral inspector of the General Land Office of the United States, and as such have examined and reported to said General Land Office as to the conditions of, and development work being carried on in, said oil fields.

I visited the NE. $\frac{1}{4}$ of Section 28, Township 31 South, Range 23 East, M: D. M., on the 7th day of

December, 1915. At said time I found on said quarter-section eight wells producing oil and one well producing gas under strong pressure. From seven of said wells oil was being pumped and from one of said wells oil was flowing without being pumped.

SILAS L. GILLAN.

Subscribed and sworn to before me this 9th day of December, 1915.

[Seal]

C. W. CALBREATH,
Deputy Clerk U. S. District Court, Northern District
of California. [75]

2. AFFIDAVITS OFFERED BY DEFEND-
ANTS, J. M. McLEOD AND CONSOLI-
DATED MUTUAL OIL COMPANY. [76]

Affidavit of J. M. McLeod.

United States of America,
Southern District of California,
Southern Division,
County of Los Angeles,—ss.

J. M. McLeod, one of the defendants above named, being first duly sworn, deposes and says:

1. That he resides at Los Angeles, California, and that his postoffice address is 519 W. P. Story Building, in that city.

2. That it is not true, as alleged in paragraph II of the complaint, that for a long time prior to or on the 27th day of September, 1909, or at any time since said date, the plaintiff has been or now is entitled to the possession of the petroleum or mineral oil or gas lands particularly described in paragraph II of

said complaint, or of the oil, or petroleum gas, or other minerals contained in said land;

2a. It is not true that the President of the United States on the 27th day of September, 1909, or at any time, withdrew or reserved all or any part of the land in the complaint described, from mineral exploration or from location, settlement, selection, filing entry, patent occupation, or disposal under the mineral or nonmineral laws of the United States. It is not true that since said date or at any time said lands have not been subject to exploration for mineral oil, petroleum or gas, or occupation, or the institution of any right under the public land laws of the United States.

3. It is not true that in violation of the proprietary or any rights of the plaintiff, or in violation of the laws of the United States or lawful orders or proclamation of the President of the United States, or in violation of the order of withdrawal of September 27, 1909, [77] the defendants or any of them entered upon said land at any time subsequent to the 27th day of September, 1909, for the purpose of exploring said land for petroleum or gas, but, on the contrary, he states the fact to be as hereinafter set forth.

4. It is not true that the defendants had not acquired any rights on or with respect to said land on or prior to September 27, 1909. It is true, as alleged in Paragraph VI of the complaint, that after the order of withdrawal of September 27, 1909, there was produced petroleum and gas from said land, but it is not true that entry upon said land for the purpose

of producing said petroleum or gas was made subsequent to September 27, 1909, but, on the contrary, such entry was made thereon in conformity with the mining laws and regulations of the plaintiff, prior to said date, and that at said time deponent and those claiming through him were *bona fide* occupants of said land, and were then actually engaged in the diligent prosecution of work thereon, looking to the discovery of oil or gas therein, and such work was continued diligently and in good faith thereafter until such discovery.

5. It is not true as alleged in paragraph VII of the complaint, that the defendants or any of them are trespassing upon said land or any part thereof. It is not true, that any oil or gas is being wrongfully sold or converted, or has at any time been wrongfully taken, sold or converted by any of the defendants from said land or any part thereof; neither is it true that any trespassing or waste has been or will be committed on said land or any part thereof, to the irreparable or any injury of the plaintiff. Responsive to said paragraph VII of the complaint, deponent states that he is not advised as to the policies of the plaintiff with respect to conservation, use or disposition [78] of said land, or the petroleum oil or gas contained therein, except as such policies are indicated by the mining laws and regulations of the complainant, and as to such laws and regulations deponent and his predecessors in interest in said land have in all respects and at all times fully complied therewith.

6. It is true that deponent claims a right in and to said lands, and in and to the oil, petroleum and gas extracted therefrom, and to the proceeds thereof. It is not true that such claim is derived directly or otherwise from any pretended notice or notices of mining locations, or by conveyances, contracts or liens, directly or otherwise from any pretended location, but, on the contrary, such claim is based upon the facts hereinafter stated.

7. It is not true that none of the defendants, nor any person or corporation from whom they have derived any interest in said lands, was on the date of the order of withdrawal on the 27th day of September, 1909, a *bona fide* occupant or claimant of said lands, or in the diligent prosecution of work leading to the discovery of oil or gas therein, but the fact is as herein otherwise stated.

8. It is not true as alleged in Paragraph XII of said complaint, that the location notice therein referred to was filed or posted by or for the sole or any benefit of this defendant, or for the benefit of some one else other than the persons whose names were used in said location notice. It is not true that the names of said locators were used to acquire more than twenty acres of mineral land in violation of the laws of the United States. It is not true that the names used in said location notice were not *bona fide* locators or that any of them was without any interest in said location notice; it is true that [79] their names and each of them were used to enable them and each of them to secure said land or patent there-

for; it is not true that any of said persons was a dummy, but on the contrary, said location was made by the persons in said location mentioned, in good faith, by and for the mutual benefit of said locators, and in conformity with the mining laws of the United States.

9. It is not true, as alleged in paragraph XII, that the defendants have no right, title or interest in or to said land or any part thereof, or any right, title or interest in or to the petroleum, mineral, oil or gas deposited therein, or any right to extract the petroleum or mineral oil or gas from said land, or to convey or dispose of the petroleum or gas so extracted, but, on the contrary, deponent states that by virtue of the complainant, he is now, and at all times since said mesne conveyance has been, and his predecessors in interest were, lawfully entitled to the possession of said premises, and every part thereof, and that such of the codefendants claiming by or through this defendant are likewise entitled to the possession of said land, and to the minerals contained therein, and to the proceeds thereof.

As a further response to said application for receiver, deponent states that prior to January 1, 1909, the land in the complaint mentioned, to wit, the northwest quarter of Section 28, township 31 south, range 23 East, M. D. B. & M., in Kern County, California, was public land of the United States, open to location and appropriation under the laws of the United States relating to lands commonly known as "placers," and on said date Herbert M. Walker, H.

E. Bashore, R. B. Welch, F. H. Roamine, Jr., W. A. Keenan, C. Rupert Walker, Eugene Metz and William [80] Mahn, each being then a citizen of the United States, duly located, according to the mining laws and regulations of the United States, and the laws of the State of California, said northwest quarter of said section 28, as the Texas Placer Mining Claim, by marking said claim upon the ground so that the boundaries thereof could be readily traced, by recording a notice of such location, and by entering into the occupation of said land and every party thereof. That thereafter deponent by mesne conveyances duly executed and delivered, for value and in good faith, succeeded to the rights of said locators, and became and now is the record legal owner of said lands and of the whole thereof.

That since said first day of January, 1909, deponent and his predecessors in interest have held, possessed and improved the land above described under the mining laws aforesaid, claiming openly, notoriously and continuously to own the same, exclusive of the rights of all other persons, and adversely thereto; that during all of said time, deponent and his predecessors in interest have paid all the taxes, state, county and municipal, which have been levied and assessed upon said land.

That on and for a long time prior to the 27th day of September, 1909, deponent and his predecessors in interest were, and ever since said date have been, *bona fide* claimants and occupants of said land, in the diligent prosecution of work leading to discovery,

and to the development and production of petroleum or gas therein. That said work was commenced by lessees and claimants under deponent in or about the month of [81] August, 1909, and was thereafter diligently continued thereon. That for the particulars of such development work, and especially as to the particulars with respect to the efforts and expenditures of said occupants in obtaining a supply of water with which to operate said claim, deponent refers to the affidavit of the codefendant filed herewith. That said lands were and are situate in a desert country, far from any source of water supply, and in the year 1909, and prior and subsequent thereto, human existence thereon was precarious and the pursuit of any drilling or other operations impossible without an assured supply of water. That long prior to the 27th day of September, 1909, and during said year 1909, work was commenced and proceeded with by affiant and those claiming under him, which was adapted to and intended for the drilling for and development of oil upon said premises, which were and are oil-bearing lands; that said work was proceeded with to the utmost extent possible without further supply of water, and that affiant and his associates on or about the first day of September, 1909, and prior thereto, and continuously thereafter, diligently, energetically and vigorously, and by every means within their power, labored toward the procurement and transportation to said land and making available thereon of sufficient water to proceed with the work so commenced thereon as aforesaid,

and that everything done by affiant and his associates and those claiming under him, toward the procuring of said water supply, was with the purpose and intention of making water available, and such water was thereby made available for the continuance of the drilling for and development of oil on said premises.

That affiant on or about the 25th day of June, 1909, made an agreement with James W. Mays covering a certain portion of [82] the premises described in the complaint herein, and at the time said agreement was made, this affiant was familiar with all the conditions surrounding the said property and the difficulties to be surmounted in proceeding with development work thereon; that at the time of the making of said agreement this affiant was anxious that the work of exploring and drilling for oil upon said premises, and particularly the portion thereof described in said agreement made with said James W. Mays, should be proceeded with with the utmost dispatch and that affiant kept closely in touch with the operations of the said Mays, and continuously and constantly insisted that the development work upon said property should be diligently proceeded with, and affiant states that said work was so proceeded with by the said Mays with the utmost diligence possible under the circumstances then existing, and in view of the great difficulties encountered, and particularly in view of the difficulty of obtaining a supply of water adequate for the purpose of proceeding with drilling; that the same diligence which charac-

terized the conduct of said Mays also characterized the operations of the successors of said Mays under said contract aforesaid.

That prior to and at the time of the passage and approval of the Act of Congress entitled, "An Act to authorize the President of the United States to make withdrawal of public lands in certain cases," approved June 25, 1910 (Chap. 421, U. S. Stats., p. 847), the development work above referred to was actually and actively being carried on upon said land under the *bona fide* location claims aforesaid, and was diligently continued to completion and discovery of oil upon said placer location. [83]

That on the northwest quarter of said section 28, three wells were drilled, one 2,978 feet deep, one 3,430 feet deep and one 2,884 feet deep; that in and by two of said wells drilled as aforesaid, a deposit of petroleum was discovered and developed; that in and by the third well drilled as aforesaid, a deposit of gas was discovered and developed, which for a time produced gas at the rate of about 1,600,000 cubic feet per day, but which at the time of the application for patent hereinafter mentioned, had decreased and then produced not in excess of 900,000 cubic feet per day. That deponent through said agencies expended upon said northwest quarter of said section twenty-eight in and about the development of said oil and gas, a sum in excess of \$95,000.

That the entry aforesaid, and the development of said land, were made with the full knowledge of the complainant herein;

That heretofore, and in or about the month of June, 1914, deponent filed in the United States Land Office at Visalia, California, his application for patent, embracing the quarter-section in the complaint described, and also other land, which proceeding was entitled, "In the Matter of the Application of J. M. McLeod for patent to the Texas Consolidated Placer Mining Claim, embracing the northwest quarter, the northeast quarter and the southeast quarter of section 28, township 31 south, range 23 east, M. D. B. & M. in Kern County, California, and containing an area of 480 acres," which application was designated as Mineral Entry, Serial No. 04655. That notice of said application was published by the Register of said Land Office as required by law. That deponent complied with the mining laws and regulations of the complainant in that behalf enacted, [84] filed his application in said land office to purchase said premises, and paid to the Register of said Land Office the amount of the purchase price thereof provided by law; that thereafter and on the 31st day of October, 1915, there was issued to deponent by Frank Lanning, Register of the said United States Land Office, his final certificate in words and figures following:

REGISTER'S FINAL CERTIFICATE OF
ENTRY.

SERIAL NO. 04655.

RECEIPT NOS. 1270754.

RECEIPT NOS. 1493022.

DEPARTMENT OF THE INTERIOR.
UNITED STATES LAND OFFICE.

At Visalia, California, October 31, 1914.

Mineral Entry, No. 04655.

IT IS HEREBY CERTIFIED That in pursuance of the provisions of the Revised *States* of the United States, Chapter VI, Title XXXII, and legislation supplemental thereto, J. M. McLeod whose postoffice address is 519 W. P. Story Building, Los Angeles, California, by U. T. Clotfelter, his Attorney, whose postoffice address is 409 *Kerkhoff* Building, Los Angeles, California, has this day purchased those placer mining claims known as the:

TEXAS CONSOLIDATED PLACER MINING CLAIMS; embracing the NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of Sec. 28 T. 31 s., R. 23 E., M. D. M.

Said placer claims as entered, embracing 480 acres in the County of Kern, State of California, as shown by the plat and field-notes of survey thereof, for which said party first above named this day made payment to the register in full, amounting to the sum of Sixteen Hundred (\$1600) Dollars. [85]

NOW, therefore, be it known that upon the presentation of the certificate to the Commissioner of the General Land Office, together with the plat and field-

notes of survey of said claims and the proofs required by law, a patent shall issue thereupon to the said J. M. McLeod, if all be found regular.

(Signed) FRANK LANNING,
Register.

Visalia, California, October 31, 1914.

I HEREBY CERTIFY, THAT the issuance of this final certificate was delayed from September 19th, 1914, till October 31, 1914, by reason of an erroneous understanding on the part of the undersigned that the affidavit of publication had not yet been filed in this matter.

FRANK LANNING,
Register.

That said certificate has not at any time since been revoked, but is in full force and effect.

J. M. McLEOD.

Subscribed and sworn to before me this 27th day of December, 1915.

BERTHA TRAWEEK,
Notary Public in and for the County of Los Angeles,
State of California. [86]

Affidavit of Alfred G. Wilkes.

State of California,
City and County of San Francisco,—ss.

Alfred G. Wilkes, being first duly sworn, deposes and says:

I became a director of the Mays Oil Company on the 16th day of March, 1909. I continued to be such director thenceforth and during the month of September, 1909, the date of the so-called "Taft

Withdrawal.” I was thoroughly acquainted with and familiar during all of said time with Section 28, Township 31 South, Range 23 East, M. D. B. and M. and had and have actual knowledge regarding the possession thereof and with the work that went on on said section during the whole of said period, and particularly with the nature and extent of the work that was actually in progress on said section upon the date of the said Taft withdrawal, to wit, September 27, 1909. I was also acquainted with the facts regarding the possession of said Section, and knew that the work that was done on said section after said order of withdrawal was made and up to the end of October, 1909.

The said Mays Oil Company from and after the 25th day of June, 1909, was in the actual, peaceable and exclusive possession of said Section 28, save and except the North half of the Northwest quarter, and the south half of the southwest quarter of the said section;

That said Mays Oil Company was organized in the early part of March, 1909. It acquired the possession of the aforesaid portions of the said Section 28 by virtue of a lease dated June [87] 25, 1909, executed by one J. M. McLeod to one James W. Mays, who was the attorney of said Mays Oil Company, and who held said lease for the benefit of said Mays Oil Company. A synopsis of said lease is hereunto annexed, marked exhibit “A,” and is hereby referred to for further particulars.

That deponent, as such director of the Mays Oil Company, was thoroughly familiar with and knew

the intentions of the said corporation, and knows that it was the intention of the said corporation from the moment it acquired its aforesaid leasehold interest in said property to proceed diligently with the sinking of an oil well upon each of the four quarters of said section;

That to that end, and for the purpose of drilling said wells economically, it was planned by said Mays Oil Company that bunk-houses, cook-house, etc., and the pipe-line to bring water for the drills, should be so constructed and situated near the center of the said Section 28 that the work of drilling the said four proposed wells might be carried on from the one camp;

That not only was it the intention of said corporation to proceed as aforesaid for its pecuniary benefit, but it was bound so to do by the terms of the lease under which it held said property. In and by the said lease it was covenanted and agreed that the lessee would, on or before the 12th day of July, 1909, "erect a suitable derrick for drilling an oil well upon the following four parcels of land, to wit: S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Section 28, Township 31 South, Range 23 East, M. D. B. & M. and will within said period erect all bunk-houses that may be necessary for the drilling operations on said parcels of land required by this agreement." It was further provided in said lease that "on or before the 12th day of August, 1909, said party shall install a complete [88] standard drilling outfit including rig and tools at one of said drilling outfit,

commence the actual work of drilling for oil with said rig and tools at the point where the same is installed as hereinabove provided, and will continue drilling operations diligently with rig until oil is struck in quantities deemed paying quantities by the second party, or further drilling becomes useless or unprofitable in the judgment of the second party."

That pursuant to the said obligations contained in said lease, the said Mays Oil Company proceeded with the work which the lessee had agreed to perform, and which it as aforesaid had planned to do. To that end a suitable skeleton derrick for drilling an oil well was erected upon each of the said four parcels of land, and all buildings and structures necessary as a camp and plant for the drilling operations on said four parcels of land were constructed.

It was obvious at the time that the said lease was taken by the said Mays Oil Company that it would not be possible to drill more than one well at a time, because of the condition of the water supply in the said district at the said time. The only available water as aforesaid was that supplied by a concern called the Stratton Water Company;

That at the time said Mays Oil Company took said lease, and during all of the period of time between the entry of the said Mays Oil Company upon the said Section 28 as aforesaid in June, 1909, and the 31st day of October, 1909, the said Stratton Water Company had but three producing water wells, two of which were of but little value, and that, as deponent has since learned, the total quantity of water

which the said wells were [89] capable of producing during all of said period did not exceed 3,300 barrels per 24 hours, whereas, the demand upon said wells was largely in excess of said supply;

That at the time of the entry of said Mays Oil Company into possession of said portions of said Section 28 in June, 1909, said Stratton Water Company was already attempting to supply customers whose demands were far in excess of the possible supply of the said wells, and said Mays Oil Company well knew that without more water than it was possible to then get from said Stratton Water Company, it would be a very difficult task to drill even one well, although the utmost care and the most economical use possible of such water as it could obtain from said Stratton Water Company should be taken and made;

That the wells of the said Stratton Water Company were situated about five miles from the center of the said Section 28, and that there was no other natural water supply of any kind or character from which Mays Oil Company could have purchased or otherwise procured water for drilling purposes anywhere within forty-five miles, or thereabouts, of the said Section 28;

That during all of the said period of time, in order to procure sufficient water even for drinking and cooking purposes, it was necessary to send a distance of seven miles from said section, and haul the same by teams to the said camp on said section;

That the conditions regarding water for use on said Section 28 were well known both to said Mc-

Leod, the lessor, and to said Mays, and to said corporation Mays Oil Company at the time said lease, Exhibit "A," was made; [90]

That by diligent effort a standard drilling outfit was completed as called for by said lease in the early part of August, 1909, and drilling was commenced in August, 1909, on the north half of the southwest quarter of said Section 28, and was proceeded with so that by September 1, 1909, the said well was down 290 feet; on September 5, 1909, the same was down 590 feet; during the following week ninety feet were drilled, and between September 12th and September 30, 1909, an additional 170 feet were drilled. The total depth of said well on September 30, 1909, was about 850 feet;

That during all of said time it was the hope and expectation of the said Mays Oil Company that the water supply of the said Stratton Water Company would be increased, the said Stratton Water Company having made repeated representations to that effect to the said Mays Oil Company;

That among the representations so made was the representation that the said Stratton Water Company was installing at great expense a new compressor which would "mean better service for everybody," and that the boiler plant of the said water company was to be replaced with three 100-horsepower, high-pressure boilers, and deponent learned that during the said period of time ending as aforesaid with the 31st day of October, 1909, the said Stratton Water Company was in fact making diligent efforts to increase its water supply. That be-

cause of the fact that the said corporation represented itself to be making great outlays in that direction, and that it would be able to increase the said supply, the Mays Oil Company hoped and believed that the said water supply would be increased, and it was at that time the intention of the said Mays Oil Company, as fast as the said water supply was increased, to start in and drill more wells [91] upon the said section at the places where skeleton derricks had been erected as aforesaid;

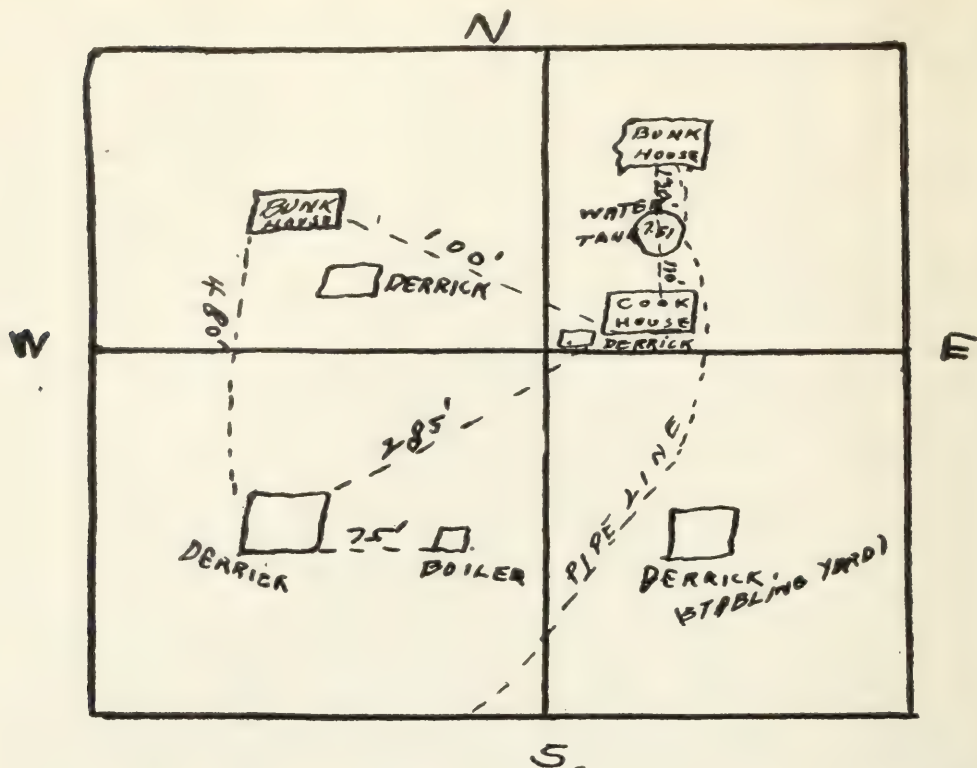
That the said skeleton derricks so erected were suitable for the purpose and were ready for rigging, and that it was the intention of said Mays Oil Company to properly equip and make use of each of said derricks, and to drill wells with the same just as fast as it could procure sufficient water for the purpose, but in the event that it was not possible to secure a further water supply than was sufficient for drilling one well at a time on the said Section 28, then it was the intention of said corporation to finish said first well, and thereafter to use the said water supply immediately in the work of drilling a second well, and so on, not only until the said four wells were drilled and completed, but thereafter as rapidly as wells additional to the said four wells could be drilled. It was at that time estimated that oil in paying quantities would be discovered in such well in from thirty to ninety days after drilling should commence;

That it would have been an easy matter for the said Mays Oil Company, and those under whom it claimed, had it or they been proceeding in bad faith,

or had it or they desired to make a mere showing of work in lieu of real development work, to have rigged up said three additional derricks and have drilled four wells of 200 feet depth, or thereabouts, in the same period of time prior to the said 27th day of September, 1909, in which it as aforesaid drilled said 850 feet, or thereabouts, in the said one well, but that at no time did the said Mays Oil Company, or those under whom it claimed, intend or attempt to make any mere showing of work; but said company was proceeding actually in good faith in its own behalf, and in compliance with the obligations to those under whom it claimed, with all of the rapidity possible under the circumstances as to water in the actual development of the said property; [92]

That the tract of land so leased to the said Mays Oil Company in said Section 28 was in the actual *bona fide*, exclusive possession and occupancy of the said Mays Oil Company prior to and on and after the said 27th day of September, 1909; that at the moment when said Taft Withdrawal order was made, the said company was in diligent prosecution of work leading to the discovery of oil on said whole tract, and on each and every governmental subdivision contained therein.

The following is a map upon which is depicted with approximate accuracy the four quarters of the said section, and the following structures which were existing on the said land at the date of the said Taft Withdrawal:



[93]

1. In the southwest quarter of said section, near the center thereof, was the aforesaid standard derrick complete. Drilling had been going on there for about a month, when said Taft Withdrawal was made. There was also thereon the pipe-line aforesaid which connected with the said Stratton wells about four miles to the southwest, which said pipe-line continued also into the east and north half of the said section. There was also a return pipe-line leading from or near the boiler near said derrick to the tank hereinafter referred to, which was in the northeast quarter of said section.

2. In the northwest quarter of said section there was a bunk-house in which some of the men engaged upon the said work had their beds, and where they slept. There was also the aforesaid skeleton derrick in place and properly set up, and ready to be

rigged with the necessary tools for drilling; that said skeleton derrick could have been rigged with tools and started within from one to four days' time, had there been sufficient water.

3. On the northeast quarter there was a tank into which the aforesaid pipe-line extended and discharged, and there was as aforesaid a return pipe-line toward the said oil well. There was also a similar skeleton derrick all set up and ready to be rigged up and used. There was also a cook-house, consisting of a kitchen, dining-room and bedroom. In this building the food of the crew engaged in drilling was prepared, and they had their meals there. Said cook-house was constructed and completed in August, 1909, and was purposely constructed with capacity to accommodate forty men, or thereabouts, and with the expectation that as the said work progressed the crews to be employed in drilling the various proposed wells would number as high as forty men. There was also another bunk-house in which some of the crew slept. [94]

4. On the southeast quarter there was the skeleton derrick erected as aforesaid, all set up and ready to be rigged for drilling. The said pipe-line also crossed into said southeast quarter. The teams hauling freight to the camp were put up and fed on said quarter near said derrick, and the same was also used as a stabling yard for the company's team.

That on the said 27th day of September, 1909, there were six men actually employed by the said Mays Oil Company upon said property, and actually

living thereon and occupying and using the said buildings and premises;

That in addition to the said six men, there were teamsters employed by the company as they were needed in hauling provisions and freight to and from the grounds, and these teams and their drivers often remained over night at the camp;

That the said company at the date of said Taft Withdrawal was expending a large amount of money, and intended to continue to expend a large amount of money in the development of the said properties so leased to it, and had actually expended in physical structures, equipment and labor on the said work between the time that the said work commenced and the date of the said Taft Withdrawal about Twenty Thousand (\$20,000) Dollars;

That no other person or persons were in occupation of the said lands, and the said Mays Oil Company had the actual *possessio pedis* thereof;

That the tools, supplies and appliances were adequate for the work; that the only thing inadequate or short was the water supply, and that the said water supply was utilized to the fullest extent possible in the sinking of the said well, and the same, so far as it had gone on September 27, 1909, had been successfully sunk without serious mishap or delays from the time that the said drilling began as aforesaid; [95]

That the men employed were skillful men, and were paid high wages for their services, and the driller, prior to said 27th day of September, 1909,

was offered and subsequently paid a large bonus in stock of the corporation for his successful work, said bonus being offered to induce him to diligent effort;

That the four wells which as aforesaid it was proposed to sink as rapidly as the water supply would permit were all to be sunk within a stone's throw of the center of said section, and each would have used, and later on did use, the water supplied through said pipe-line.

Upon the question of diligence, this deponent further says that the work which the said Mays Oil Company was diligently prosecuting on said section was work "leading to the discovery of oil" on each of the said four quarters of said section at the time of the making of the said Taft Withdrawal order. In that behalf this deponent further says:

That the instructions of the said Mays Oil Company to its employees during all of the said times had been and were to proceed with the utmost diligence in the sinking of the said well in the southeast quarter of Section 28, and the drilling of the said well was in fact proceeded with just as diligently and as rapidly as work of that character could be proceeded with in view of the unsatisfactory water supply;

That it was believed by the said Mays Oil Company that oil would be found in each proposed well, but this could not be definitely determined until a discovery in one of said wells was made. A discovery of oil in the well where said drilling was in progress on September 27, 1909, in paying quanti-

ties, would for all practical purposes have made it certain that each of said four quarter-sections contained oil, and the labor being done on said lands on said day tended to the development [96] of the whole thereof, and tended to determine their oil-bearing character;

That at no time during the said work was the failure to proceed with drilling on each of the said quarter-sections due to any other reason than the one fact as aforesaid that the water supply was inadequate. The said company had the means to keep up and equip all four of said skeleton derricks and do the necessary drilling; it had the belief that the oil was there; it had the desire to develop it as quickly as possible; the market was satisfactory, and offered large profits to the company if oil could be discovered in paying quantities, and it was the earnest effort of the said corporation during all of said time to proceed with drilling upon all four of the quarters of the said Section 28, and the said drilling would in fact have been proceeded with, and would have been in actual progress on each of the said four quarter-sections of said section at the time of the said Taft Withdrawal but for the aforesaid shortage of water; that as it was, the said Mays Oil Company was doing the utmost that was physically possible in the prosecution of work leading to a discovery of oil upon all of the four quarters of the said Section 28 at the time that the said Taft Withdrawal went into effect;

That the same diligence continued, and the same

state of affairs as to possession, expenditure and drilling continued in the same manner after the said Taft Withdrawal as during the months previous thereto, and the possession of the said company of all of said lands so leased to it continued to be exclusive, and the occupation and use of the said lands by the said company continued in the same good faith, and was accompanied by a very large expenditure and outlay of money continuously until the end of October, 1909, at which time Mr. Charles A. Sherman took [97] charge of the property in behalf of the corporation;

That at the said time, this deponent ceased to have any connection with the management of the said property, but deponent was frequently upon said property during several months after Mr. Sherman's arrival, and observed that work thereon was being proceeded with in the same diligent and continuous fashion as formerly.

(Signed) ALFRED G. WILKES.

Subscribed and sworn to before me this 27th day of December, 1915.

ALICE SPENCER,
Notary Public in and for the City and County of San Francisco, State of California. [98]

Exhibit "A."

J. M. McLEOD,

First Party,

to

JAMES W. MAYS,

Second Party.

Dated June 25, 1909.

Recites: For and in consideration of the sum of \$1.00, Gold Coin of the United States to him in hand paid by the second party, receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter expressed and by the second party to be kept and performed, the first party has demised and leased and does hereby demise and lease to the second party the land situate in Kern County, State of California, described as the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the NE. $\frac{1}{4}$, the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of Section 28, Township 31 South of Range 23 East, Mount Diablo Base and Meridian, and have granted, demised and leased and by these presents does grant, demise and lease to the second party all the oil, gas and other hydro-carbons and minerals of every kind and character whatsoever in and under said lands with covenants of general warranty for the quiet enjoyment and peaceable and exclusive possession of the premises by the second party and that the first party has the sole right to convey the premises with the exclusive right to construct and maintain telephone, telegraph and pipe-lines and roadways leading from adjoining lands on and across the premises, the right to erect and maintain buildings, derricks and other structures useful and necessary for boring, drilling and excavating, for handling oil, gas and other hydro-carbons on said premises and the right to the free use of sufficient water, gas, oil and hydro-carbons from the premises for the proper operation of the lands herein leased and the right to remove during, or after the term of this lease and grant, all

[99] the machinery, tools, pipes, tanks, appurtenances and property placed or erected thereon by the second party.

To Have and to Hold, to the second party the whole or any part of said premises for the term of twenty years from the date hereof and as much longer as oil is produced therefrom in quantities deemed paying quantities by the second party.

The second — agrees on or before the 15th day of July, 1909, to erect a suitable derrick for drilling an oil well upon the following four parcels of land, to wit:

S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Section 28, Township 31 South, Range 23 East, M. D. B. & M., and will within said period erect all bunk-houses that may be necessary for the drilling operations on said parcels of land required by this agreement.

On or before the 12th day of August, 1909, said party shall install a complete standard drilling outfit including rig and tools at one of said derricks on Section 28, and shall promptly upon the installation of said drilling outfit, commence the actual work of drilling for oil with said rig and tools at the point where the same is installed as hereinabove provided and will continue drilling operations diligently with rig until oil is struck in quantities deemed paying quantities by the second party or further drilling becomes useless or unprofitable in the judgment of the second party.

The second party further agrees that within thirty days after oil is discovered in quantities deemed pay-

ing quantities by the second party in either of said wells *it* will begin the actual work of drilling for oil on each of the three remaining halves of quarter-sections of the section in which such discovery is made and at the points where the three remaining derricks [100] on said sections have been erected as hereinabove provided and will continue such drilling diligently until oil is struck in paying quantities deemed such by the second party or further drilling becomes in the judgment of the second party useless or unprofitable.

The first party further agrees that upon the discovery of oil in quantities deemed paying quantities by the second party upon any quarter section of land hereinabove described, the first parties will immediately make or cause to be made application to the Government of the United States for Letters Patent to said quarter-section of land and will pay one-half of all expenses of every kind which may be incurred in procuring such patent; and in the event of the failure of the first party so to do, the second party shall be and hereby is authorized on behalf of the first party, to apply or cause application to be made for such patent at the expense of the first party.

The second party shall deliver to the first party the one-eighth part of all oil produced and saved from said lands or from any part thereof prior to the purchase thereof by the second party pursuant to the option herein granted. Delivery shall be made upon the party of the land credited with the royalty.

The second party agrees that so long as any of said lands are operated by him under and pursuant to

this lease he will pump diligently all producing wells except when the value of oil shall be less than forty cents a barrel at the well and except when in the judgment of the second party, the quantity of oil produced by such pumping operations is not sufficient to justify the continuance of such pumping.

It is further understood and agreed that the drilling operations of the second party hereunder shall be suspended at the option of the second party, if at any time the value of oil [101] shall be less than forty cents a barrel at the well, or if the quantity of oil produced from producing wells on said lands or any part thereof shall be such that in the judgment of the second party further development of said lands shall be unprofitable.

Except as herein otherwise provided, the second party shall have the right to remove during the life of this agreement or within ninety days after the termination thereof by giving sixty days written notice, all the machinery, tools, pipes, tanks and appurtenances and property placed and erected thereon by the second party.

The second party shall have the right to surrender all or any one or more of the four parcels of land above described at any time within one hundred and twenty days after a first well drilled by the second party on any of said parcels of said land has commenced pumping. And the second party shall have the option at any time within any such one hundred and twenty days of purchasing all or any one or more of the above-described four parcels of land at the purchase price of \$250 per acre.

The second party shall have the further option of designating at any time within any one hundred and twenty days after a first well on any one of said four parcels has commenced pumping, whether it elects to continue this lease as to such parcel or as to all or any of the parcels herein described and thereafter the second party shall have the option at any time during the term of such lease to purchase the parcel or parcels as to which it has so elected to continue said lease, at the purchase price of \$250.00 per acre. Upon the purchase of any parcel or parcels of said land this lease shall forthwith cease as to such parcel or parcels.

In the event that the second party surrenders the lands herein demised or any parcel thereof, the first party shall have [102] the right to purchase the inside casing of any well on any of said parcels of land at seventy-five per cent of the cost of such casing on the land, and before installation in the well, provided, however, that the first party as a condition of the right to purchase said casing shall within ten days after receipt of written notice of surrender of the second party of said parcel or parcels, signify his intention to exercise the option to purchase said casing.

The second party agrees during the term of this lease, acts of the elements, the public enemy, strikes or other inevitable causes excepted, to run one string of tools continuously, and finish an average of one well each year on each the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, and one well on the balance of said lease on said Section 28, held by the second party

pursuant to this lease until there shall be on each five acres of land so held one well; provided that nothing herein contained shall prevent the second party from drilling as many wells as he may elect on any parcel of said land.

The first party shall and hereby covenants and agrees upon the written demand of the second party made at any time within one hundred and twenty days after the first well has commenced pumping on any of said parcels and after final receipt by the United States Government shall have been issued in any patent application or applications prosecuted for such parcel, to convey to the second party by good and sufficient deed free of encumbrances such parcel upon the payment to the first party by the second party for the same at the rate of \$250.00 Gold Coin of the United States for each acre of land so purchased by the second party in the exercise of its option under the provisions of these presents.

This agreement and the rights and obligations thereof shall [103] inure to and bind the respective successors and assigns of the parties hereto.

(Signed) J. M. McLEOD, (Seal)

(Signed) JAMES W. MAYS, (Seal)

Per A. G. WILKES,
Atty. in Fact.

Acknowledged in due form June 25, 1909, before C. L. Claflin, Notary Public, Kern County, California (no seal), by J. M. McLeod; also, on said day before same officer (no seal), by A. G. Wilkes, as attorney in fact of James W. Mays. [104]

Affidavit of Charles H. Sherman, December 27, 1915.

State of California,

City and County of San Francisco,—ss.

Charles H. Sherman, being first duly sworn, deposes and says:

On or about the 27th day of October, 1909, I arrived in the State of California from the East, and on the 30th day of October, 1909, I was upon Section 28, Township 31 South, Range 23 East, M. D. B. & M.;

At the said time I was employed by the Mays Oil Company as its general manager, and went upon the said section upon said date in the interests of said company, and as such general manager;

At the time of my arrival upon said section the said company was in the actual possession of a tract of land embracing the following described portions of said section, to wit: The Northeast quarter, the South half of the Northwest quarter, the North half of the Southwest quarter, and the Southeast quarter;

I went completely over the said properties and examined the boundaries thereof, and know that the said Mays Oil Company was on said day in the actual, peaceable possession thereof, claiming the same under James W. Mays, J. M. McLeod, and their predecessors in interest;

That on said day there were employees of the said Mays Oil Company other than myself living and working upon each and all of said governmental subdivisions which made up said tract of land;

That the said governmental subdivisions were con-

tiguous and that the possession of the said corporation, Mays Oil Company, on said day and ever thereafter was peaceable, open and [105] notorious and was not interfered with adversely at any time by any other person or corporation and that the same was a *bona fide* possession under a title founded upon written instruments purporting to convey the title;

That during the whole of said period from and after the arrival of deponent upon said property until the said Mays Oil Company disposed of its said holdings there were officers, laborers or employees of said corporation in physical possession of said property;

That from and after deponent's arrival upon said property he took charge of said premises and was upon each and every one of the aforesaid governmental subdivisions of said tract of land daily during the whole of the said period;

That until deponent's arrival on said property one Alfred G. Wilkes was the managing director of said property and in charge of the said property for said Mays Oil Company, and by the direction of the said Wilkes the possession thereof was delivered to this deponent as manager of said Mays Oil Company on the said date of deponent's arrival;

That the tracts of land hereinabove described, to wit: The northeast quarter, the south half of the northwest quarter, the north half of the southwest quarter, and the southeast quarter, of said Section 28 constituted a contiguous parcel of land made up of the aforesaid subdivisions and that the possession of said corporation, Mays Oil Company, extended to

each and every part of the said parcels;

That at the time of deponent's said arrival upon the said tract of land there were situated thereon the following described structures: Two skeleton derricks, one derrick fully rigged, equipped and in operation; two bunk-houses, one cook-house, consisting of a bedroom, kitchen, and dining-room, the latter capable of accommodating forty men; a water tank from [106] which a pipe-line extended for four miles or thereabouts to the wells of the Stratton Water Company, and a boiler, set up and in operation, a 25-barrel fuel-oil tank situate near and used in connection with said boiler. The brush had been cleared away from around the derricks and the different buildings. There was also a road which terminated at the northeast quarter of said section and which extended thence south through the whole of the southwest quarter of the said section, which said road was the road leading to the town of Taft about seven miles distant. There were piles of stove-pipe casing and 12½ inch casing, and a full equipment of drilling tools. At the derrick on the southeast quarter was the place for stabling the company's team and the teams used in hauling freight to the plant. Hay was stored therein. It continued to be used as a stabling place at all times in 1909 until a building for use as a stable was erected by the company thereon;

That the center of the said section was very near to the properties hereinabove described and that one or more of the structures hereinabove referred to was upon each of the several subdivisions of the said sec-

tion, and the whole was used as one camp and the possession of the premises was not confined or directed to one fractional subdivision thereof more than to another;

That all of said buildings or structures and said stabling place on such fractional subdivision which went to make up the said tract of land was actually in use in accomplishing the work of drilling upon the said property;

That the well being drilled on the said 30th day of October, 1909, when deponent arrived was situate near the center of Section 28, about 300 feet in a southwesterly direction from said center and was on the north half of the southwest quarter of said section; [107]

That a boiler had been erected and in place near the said derrick over the said well; that one of the bunk-houses was on the south half of the northwest quarter of said section, and the water tank, one of the bunk-houses and the cook-house were on the northeast quarter of the said section;

That the crew of men engaged in the said work of drilling the said well used both the said bunk-houses for sleeping purposes and ate at the aforesaid cook-house; that the water then in use was highly impregnated with sulphur, and while good enough for drilling purposes was not good for cooking or domestic purposes, and that in order to get drinking water and water for cooking purposes, it was necessary at said time to either bring the water in in tank-wagons from the town of Taft or to distill the said sulphur water;

That it was the duty of this deponent to keep the said drill running and the instructions given to this deponent were to proceed with all the diligence possible not only to complete the said well but to drill additional wells not only at the location of the aforesaid skeleton derricks which had been erected on said tract as aforesaid but also to proceed with the erection of further and additional wells as rapidly as water could be obtained and to procure water from any point where the same could be obtained in suitable quantities and at a cost within the bounds of reason;

That at no time after the arrival of deponent in California was the said company short of funds, but on said day and thenceforward there were abundant funds with which to proceed with the said work;

That deponent proceeded immediately to investigate the water situation at the said well and in the said district and [108] to devise means if possible to secure more water for the purpose of drilling. As a result of such investigation deponent learned almost immediately after his arrival upon said section as aforesaid that the supply then being obtained from the said Stratton Water Company was inadequate for the purpose of proceeding properly with the said drilling operations at said one well. That as will hereinafter more fully appear the said well was drilled under great difficulties because of lack of sufficient water; that it reached the depth that it did reach only as a result of the utmost precaution and care in husbanding the water supply that was available and that the said well was ultimately lost be-

cause of the insufficient supply of water for drilling;

Deponent further discovered that the total water supply of the said Stratton Company was utterly inadequate to meet the demands upon it of the said district and particularly of customers located nearer to the wells of said water company than was the said Mays Oil Company; that the companies so located had been customers of said water company prior in time when the said Mays Oil Company became a customer;

Deponent further discovered that there was no other water supply in the district, and that in order to pipe water into the said district from any natural source it would then have been necessary to go a distance of forty miles or thereabouts; that the cost of bringing such water such a distance was prohibitive;

That to the town of Taft situate about seven miles from the said works of the said Mays Oil Company on Section 28 water was brought in for drinking and domestic purposes in tank cars by the Santa Fe Railroad Company and was carried for that purpose a distance of forty miles and upwards to said town of Taft; [109]

That the only other water within said district was brought in by the Santa Fe Railroad Company to a point about eight or ten miles distant from the said Section 28 and was there used by the said Santa Fe Railroad Company for its own purposes; that deponent soon after his arrival in the said field called upon the officials of the said Santa Fe Railroad Company and to that end interviewed the employees of the said company in charge of said water, includ-

ing a Mr. Barber and a Mr. Mays, who were superintendents in charge thereof, and later interviewed Mr. Ripley, son of the president of the said road, who was one of the managing agents in charge of the said water, with a view to purchasing from the said Santa Fe Railroad Company a sufficient water supply to supplement the amount required for satisfactory drilling of the said well then under construction and also to enable the said Mays Oil Company to drill additional wells upon the said tract of land of which it was in possession as aforesaid and operate drills simultaneously at the site of the derricks then upon the said tract of land; that the said Santa Fe Railroad Company refused to sell to or to permit the said Mays Oil Company to have any water whatsoever;

That for months after the arrival of deponent upon the said property the necessity for water in the drilling operations then in progress at said well were so imperative and the supply so inadequate that this deponent visited said Stratton Water Company almost daily and on some days three or four different times in the day in order to see that every particle of water that could be coaxed or cajoled from the said company should be put into the pipes of Mays Oil Company for delivery at said well;

That at no time thereafter or prior to the year 1911 was any water piped into the said district by any person or corporation; [110]

That the well at the time of deponent's arrival was down about 850 feet and the further work proceeded with increasing difficulty because of the lack

of water; that at no time could deponent secure from said Stratton Water Company sufficient water to keep the casing free in the well, with the result that the said drilling was many times stopped because of the lack of water to keep the casing free; that often it was necessary to stop drilling for several hours at a time because of the lack of water; that the shutting down of drilling in a well of that character, where there is not sufficient water to keep the casing free is very dangerous, and is apt to prevent entirely the further drilling of the well, and there finally came a time at or about the end of the year 1909 when the casing became stuck and the entire hole was lost; that this was prior to any discovery of oil therein in paying quantities;

That the loss of said well was due entirely to the lack of water and that at the time the same was lost it had cost the said company an amount which this deponent believes to be in excess of \$10,000; that during all of the said period of time the Stratton Water Company was making efforts to increase its supply of water; that to that end it was sinking or enlarging its wells, installing a compressor and new boilers, and its officers were repeatedly stating to deponent that they would soon have an increased water supply adequate to satisfy the necessities of the said Mays Oil Company, not only for the drill which was then being operated but for the purpose of drilling its other intended wells;

That deponent acting as manager of said company believed said representations and expected that just as soon as the diligent efforts of the said

Stratton Water Company could bring it about, the water company's supply would be increased, and the [111] said water supply of the said Mays Oil Company would be increased through the said Stratton Water Company, to a point where its drilling necessities would be met;

That after the loss of the aforesaid well—the same being the first hole drilled upon the said tract of land—deponent immediately caused a second well to be started; that to that end he retained the boiler in its then position but moved the derrick east a distance of about thirty feet; that the said hole thus started was started on or about the 1st day of January, 1910, and was continued diligently in the same manner and with the same diligence as that which had attended the sinking of the said first well;

That the difficulties with water continued during the year 1910; that as in the case of the said first well, stoppages varying from a few hours to a few days for want of sufficient water occurred; that the said well finally struck oil in paying quantities at a depth of upwards of 3,000 feet; that the work on the said well was proceeded with diligently and without interruption save such as is incidental to all similar work, until oil in paying quantities was struck thereon some time in the year 1912; although both oil and gas were struck in the said well long before the same was developed in paying quantities;

That deponent was anxious at all times to begin boring another well, but did not dare to begin such

work because of the shortage of water, until March, 1911; that by the said time there had been some improvement in the supply of the said Stratton Water Company, brought about in part by the expenditures which the said Stratton Water Company had gone to upon its property, but chiefly because of the fact that said Stratton Water Company [112] agreed with deponent, acting in behalf of the Mays Oil Company, that it would shut off the supply of certain customers who had failed to pay their water bills, and would give the additional supply thus secured to the Mays Oil Company. Accordingly, deponent, in behalf of the said company, caused the water-pipe line to be extended to a point near the north line of the south half of the north half of the northeast quarter of said Section 28 near the northeast corner of said section, and began diligently the drilling of said well at the first moment that water could be obtained for the said purpose from the said Stratton Water Company in sufficient quantities, in addition to that already obtained, to make it possible to run two rigs simultaneously; and also, preparatory to further drilling on said northeast quarter, deponent caused a tank to be built near the north line of the said quarter, and extended the said pipe-line to the said tank, and built a return gravity pipe-line to the said derrick; that thereafter the work of drilling the said two wells was proceeded with simultaneously;

That oil was produced in paying quantities in the said second well (being the third hole on which drilling was done) many months before oil was pro-

duced in paying quantities in the said first well; that the said Mays Oil Company let a contract with a drilling firm, whereby said drilling firm was to drill for the Mays Oil Company three wells; that the said drilling company began to sink the first of these additional wells on July 28, 1911, at a point on the south half of the northwest quarter of said Section 28 at the skeleton derrick that had already been erected thereon at the time of the first arrival of deponent on said section in 1909; that the said derrick was actually rigged up, and used in the drilling of said well; [113]

That by that time, through the failures of its other customers, or by increasing its water supply, or both, the said Stratton Water Company was enabled to furnish water sufficient to drill two wells simultaneously, although the supply for the said purpose was not entirely sufficient to operate both sets of drilling tools with full satisfaction; that oil in paying quantities was produced in said well No. Three in June, 1912; that the work of sinking the same was proceeded with diligently and without interruption from July, 1911, to the production of oil in paying quantities in June, 1912;

That deponent continued working upon the said properties for said Mays Oil Company and its successors until May, 1914; that during said period of time ten wells, producing oil in paying quantities, were sunk; that there never was a time during the whole period from the date of deponent's arrival in October, 1909, to the time that he ceased to be man-

ager of said properties in May, 1914, when he did not have a string of from one to three sets of tools drilling upon said property;

That deponent was during all of the said period of time personally interested in the shares of stock of the company which employed him, and that he had great personal inducement to proceed with the work of developing the said property as rapidly as the same could be done; that at no time was the company short of funds for the said purpose, and that at all times it had ample credit, and that with one concern alone it had a credit of \$100,000 at all times from 1909, to the time that deponent's employment upon said property ceased, and that said development of each of the said properties and each of the said governmental subdivisions thereof was proceeded with as [114] rapidly and diligently as was physically possible in view of the water difficulties encountered, and the nature and object of the enterprise; that since deponent's employment upon said property ceased, he has, nevertheless, been financially interested therein, and has visited the said property nearly once a month since that time, to wit: since May 4, 1914; that he has observed the work that has been done upon the said property since May 4, 1914, and has noted that four wells have been sunk since that time and that the work of developing said property is diligently pursued by those now in charge;

That taxes were levied upon all of the said land, and were paid by deponent in behalf of his employers; that the aforesaid possession of said property

was maintained in absolute good faith, and was accompanied during the time deponent was so employed by an expenditure of more than \$500,000.

This deponent has had a very wide experience in the drilling of oil wells and knows what is necessary and essential thereto. In addition to a derrick, and the necessary drilling tools, machinery and pipe, the three essentials to drilling a well are labor, power and water; that without either one of the three last-named requisites it would be as impossible to drill such a well as it would be to drill the same without tools or machinery. Labor is no more important than is water. Without a proper supply of water it is not possible to perform such work. In the case of Section 28 we could get all of the essentials for drilling, except an adequate supply of water as hereinabove fully appears.

CHARLES H. SHERMAN.

Subscribed and sworn to before me this 27th day of December, 1915.

ALICE SPENCER,

Notary Public in and for the City and County of San Francisco, State of California. [115]

Affidavit of Louis Titus.

State of California,

City and County of San Francisco,—ss.

Louis Titus, being first duly sworn, deposes and says:

That he is the president of North American Oil Consolidated, a corporation, and has been the presi-

dent of said corporation from the time it was organized in December, 1909, down to the present time.

That North American Oil Consolidated succeeded to the property and interests of a corporation known as the "Hartford Oil Company," and that this affiant was the president of said Hartford Oil Company from the time of its incorporation in May, 1909, down to the date of the dissolution of said corporation sometime in 1910. That said Hartford Oil Company was operating upon Section 16, Township 32 South, Range 23 East, M. D. B. & M., Kern County, California, during the year 1909, and drilling wells thereon; and also on Section 22, same township and range, during the same period of time. That in January, 1910, said operations were taken over by said North American Oil Consolidated and have been conducted thereon ever since, down to the present time. That in February, 1910, said North American Oil Consolidated began operations on Section 26, same township and range; and also upon Section 15, same township and range. That the operations on all the foregoing property included the drilling of a considerable number of wells. That the above sections of land, with the exception of Section 15, were patented sections, the land in Section 22 and Section 26 having been patented by the United States Government to the predecessors in interest of the corporation above mentioned, under placer mining locations.

That beginning in January, 1910, and continuing throughout the year 1910 and a part of 1911, said corporation was operating on Sections 27 and 28,

same township and range. Said Sections [116] 27 and 28 were not patented claims but were held under placer mining locations.

That from the beginning of the operations of said Hartford Oil Company the greatest difficulty was experienced by said company in procuring sufficient water with which to drill its wells. The only sources of water supply available in that portion of the field at that time was one water system owned by H. C. Stratton (which was afterwards turned over to the Stratton Water Company, a corporation); and a second water system belonging to a corporation called the "Chanslor-Canfield Midway Oil Company," which was in fact, owned and operated by the Santa Fe Railroad Company. That this affiant personally made efforts in the beginning to secure water from said Chanslor-Canfield Midway Oil Company but was positively refused, the officers of said company claiming that they had no water to sell, all the water they had being required for their own purposes. That he did succeed in buying water from H. C. Stratton, and the first water was delivered to Hartford Oil Company by said Stratton in May, 1909, and thereafter more or less water was delivered by said Stratton Water Company to the corporation above mentioned for a period of several years. That said source of water supply was very inadequate and inefficient; that there was never more than sufficient water to drill one well at any one time, whereas said corporation very much desired to drill several wells at the same time. That many times operations had to be shut

down because there was no water to operate even one string of tools. That these delays were expensive and costly because of the danger of losing the casing in the hole and because the labor had to be paid for whether the tools were being operated.

[117]

That this affiant expostulated with said Stratton and other managers of the said water company, many times over the inadequacy and inefficiency of the service, but said company was totally unable to supply any greater amount of water because their system was insufficient and had no greater capacity.

That thereupon, toward the end of 1909, this affiant despaired of getting water in sufficient quantities from the said Stratton Water Company and began negotiations again with the Chanslor-Canfield Midway Oil Company; and that he finally succeeded in purchasing some water from the said Chanslor-Canfield Midway Oil Company. That said company would make no promise that it would furnish any particular amount of water, but that it would allow us to turn the water on when there was water in the pipes to be had. That this source of supply was also very inefficient and totally inadequate to meet the wants of said corporation, North American Oil Consolidated. Nevertheless, said corporation continued to buy water from both of said water companies during the early part of 1910. That early in 1910, despairing of getting sufficient water from these two water companies, or from any other source that was apparently available, this affiant caused to be constructed a side track along

the railroad, running across a portion of the property of the North American Oil Consolidated on Section 15; and thereupon for a period of several months, beginning with September, 1910, water was shipped by trainload to said North American Oil Consolidated, from Bakersfield to said side track on Section 15, and from there was pumped to Section 22, Section 16 and Section 26. That said operation required the laying of long strings of pipe and the installing of expensive pumping machinery. That this method of procuring water proved to be so expensive that it was not practicable and was finally abandoned in April, 1911. [118]

That Section 28 is in the same general locality as the sections heretofore mentioned as being operated by North American Oil Consolidated; that the said general conditions as to water existed on Section 28 as existed on the sections hereinbefore mentioned.

It is, of course, true that water could have been hauled in wagons for many miles and across a country having no roads. It would have been a physical possibility to have drilled wells in this manner, but as a practical commercial proposition it was absolutely prohibitive and the cost would have been so colossal that no well could have been drilled with any profit no matter how great the returns from such a well. The whole country in which Section 28 is located is an arid country, almost desert in character, with practically no vegetation; and no surface [119] water and no well water could be had except at extraordinarily great depth. During 1909, and until the latter part of 1910, it was not

known nor even supposed that any water could be procured from wells at any depth whatever. All of the surrounding drilling at that time had tended to prove that no water in any quantities could be obtained from such wells, and it was only after 1910 it was found that, by drilling very deep wells and installing expensive pumping machinery, water in commercial quantities could be lifted from some wells in that vicinity; all water from such wells being salty and totally unfit for domestic purposes, but could be used for the purpose of drilling wells.

That in drilling an oil well large quantities of water must be constantly used, and any stoppage in the water supply while a well is being drilled is almost sure to be disastrous, frequently resulting in freezing of the casing, thus making an additional expense of several thousand dollars; and, moreover, such lack of water very frequently results in absolutely ruining the well, necessitating an abandonment of that particular well and beginning all over on a new well.

That during the early part of 1910, this affiant, seeing that there would be great difficulty in procuring any adequate water supply for drilling in said locality, together with certain of his associates, employed engineers and began plans for bringing in a source of water supply that would be adequate to meet the requirements, (at least in some small degree) of said locality. That in pursuance of this employment, said engineers caused certain surveys to be made from Pine Canyon in the Santa Barbara range of mountains for a distance of over forty miles to said Midway field; and complete plans and specifications were

made for the laying of a pipe-line for said distance. Bids were actually procured for the building of said pipe-line upon [120] said specifications, whereupon it was found that the cost of building said pipe-line would be prohibitive and would be much greater than any possible return from the same would warrant.

That this affiant and his associates spent altogether approximately Ten Thousand Dollars (\$10,000) in making said surveys and in endeavoring to find an adequate source of water supply. That this expense was incurred beginning in the very early part of 1910, down to the beginning of 1911. That at all the times mentioned in this affidavit this affiant was acquainted with the owners of Section 28 involved in this action. That he knew of the difficulties the owners of Section 28 were having in procuring water at all times beginning with the middle of 1909, down to the end of 1910. That as a practical commercial proposition it was impossible to have procured water for *Section* for purposes of drilling at any earlier time that the same was actually procured. That he was thoroughly familiar with all possible sources of water supply during 1909 and 1910 for said locality; and that this affiant does not believe that by any degree of diligence, or any expenditure within the bounds of reason, any supply of water sufficient for drilling purposes would have been procured in any manner for Section 28 at any earlier period of time than the same was actually procured.

That this affiant is president of Consolidated Mutual Oil Company, a corporation; and said corporation, together with its predecessors in interest, has

been in the actual and notorious possession of said Section 28, and working the same, to the knowledge of this affiant, for more than six years prior to the commencement of this action.

That the said Consolidated Mutual Oil Company acquired and entered into possession of said properties in the month of February, 1914, and from that time forward this deponent has [121] been the president of said corporation and has had the active management of its affairs;

That at the time that the Consolidated Mutual Oil Company took possession of said Section 28, as aforesaid, there were situate on the said section six completed wells in which oil had been discovered in paying quantities and there were two wells upon which drilling had been started, and which had been partially drilled;

That since the said corporation acquired the said properties it has erected upon the said properties elaborate improvements and drilled three new wells, and has also proceeded with the drilling work that was in progress at the time that the said properties were acquired;

That the said corporation has during the said period laid out and expended in improvements upon said property, and in drilling wells and in exploration and development work, a sum in excess of \$150,000; and that the improvements now upon the said property are of a value in excess of \$150,000;

That the occupation of the said Section 28 by the said corporation, and its predecessors in interest, were and have been at all times open, notorious, and

were at all times actually known to the Land Department of the United States Government, and that whatever activities in the way of development and improvement of the said property have taken place were with the full knowledge of the officers and agents of the Land Department of the United States. That during all of the said period of time the said corporation has given to the agents of the Land Department free access to its books and records of all kinds, and the said United States Government has at all times during the said period had actual reports and knowledge of the improvements that the said corporation was making upon said property, and has had access to the books and papers of said corporation [122] showing the amount of oil that it had extracted and was extracting, and showing the contractual obligations which said corporation was under in the matter of its equipment and the disposition of its oil supply;

That during all of the said time the plaintiff through the officers and agents of its Land Department has had actual knowledge that the defendant, Consolidated Mutual Oil Company, was in possession of the said property under a claim of right, and it has during all of said period of time and until the filing of this suit stood by and knowingly permitted the said defendant corporation, without objection, to make the aforesaid expenditures of money and to extract oils from said properties and to incur obligations in and about the development of said property, and to develop the said property to its present condition and to extract therefrom the very oil the value of which

it is here seeking to recover;

That deponent is informed and believes, and on such information and belief avers, that similarly with full knowledge of the facts concerning the location and possession and the work that had been done upon the said Section 28 on and prior to the 27th day of September, 1909, plaintiff stood by and knowingly permitted the predecessors in interest of the said Consolidated Mutual Oil Company to remain in undisputed possession of the said premises and to expend, in work and labor tending to the development of oil on said property, upwards of \$200,000. That the money so expended had been expended in large part in developing the identical wells upon the said property which were producing oil at the time that the said Consolidated Mutual Oil Company purchased the said property, and that the purchase of the said property by the said corporation was largely induced by the said developments. That because of the said development the said corporation has paid to its predecessors in interest more than \$500,000. [123]

That deponent as president of said corporation has made a rigid and careful study of the most economical methods of handling the business conducted by the said corporation.

That the said business is one which deals with large quantities of oil and with a very great number of items of expense, and that the difference of a very few mills or cents upon each item involved results in great aggregate loss or gain to the said corporation; that the business is one requiring for its successful conduct careful training and years of experience and

calls for all of the energy and painstaking perserverence of self interest in order that such business shall be economically and advantageously administered; and in order that its wells may continue to produce. That without such an administration of said corporation's business great and irreparable loss will result to the said business and to the said corporation and its stockholders;

That men trained in the said business and who have the time at their command, and are in a situation to devote the necessary energy to conduct such a business, would be very difficult to find; that deponent in his own experience has found it impossible to himself select or procure thoroughly satisfactory assistants in such work, regardless of the amount that he has been prepared to pay therefor. Deponent verily believes that it is most improbable that this court could find a person to act as receiver of said business who would administer the said business without serious and irreparable loss and detriment to the said corporation and its stockholders.

That in the judgment of this deponent a receiver cannot be appointed to take charge of and operate the said properties without irreparable loss and injury to the said corporation; [124]

That the said corporation is fully able to respond in damages for any detriment the plaintiff may suffer pending this litigation.

LOUIS TITUS.

Subscribed and sworn to before me this 28th day of December, 1915.

C. B. SESSIONS,

Notary Public in and for the City and County of San Francisco, State of California. [125]

Affidavit of E. W. Kay.

State of California,

City and County of San Francisco.—ss.

E. W. Kay, being first duly sworn, deposes:

That he was during all of the time hereinafter mentioned manager of the Stratton Water Company; that he is not a party to nor in anywise interested in the above-entitled action.

That from August, 1909 to July, 1910, the Stratton Water Company was engaged in the business of producing and selling water in the North Midway Field; that during said time, it had three producing wells; that two of said wells were of little value, and all the water they would produce in 24 hours could be pumped out in an hour and a half; that during said period of time, Stratton Water Company at no time, operating its wells for full capacity during twenty-four hours, could produce in excess of 3,300 barrels of water.

That during said period of time the Stratton Water Company had application from Oil Companies desiring water for 16,000 to 20,000 barrels a day; that Stratton Water Company actually entered into arrangements to supply from sixteen to twenty oil companies with water at from seven to nine cents a barrel; that the requirements of these companies were for not less than 7,500 barrels a day for current

use, and it was necessary in the interests of due caution that each company should have from 700 to 1,000 barrels of water on hand to hold down heaving sands which would destroy the well; that in the endeavor to supply the requirements of its companies with which it had contracts, and which companies needed 7,500 barrels a day with the 3,300 barrels total output of the Stratton Water Company, it was the policy of the company to divide this water up as equally and equitably as possible; [126]

That in pursuance of this policy, whenever one well got into serious trouble and was in urgent need of a large amount of water, it was customary to shut off the water supply of the other companies and supply the necessities of the company that was in trouble;

That during said period of time, one of the companies which it supplied with water was the Mays Oil Company; that this company was supplied through a two-inch pipe-line which was built by the Mays Oil Company, and ran for a distance of about three and a half miles; that at no time could the Stratton Water Company, in view of its contracts, have furnished the Mays Oil Company with enough water to run more than one well; that it was the policy of the Stratton Water Company never to supply its customers with more than enough water to run one well; that the well of the Mays Oil Company was often shut down on account of lack of water, and that said company lost a string of casing and finally lost the well, and had to start a new one by reason of failure of water supply;

That during this period of time, there was no other water supply in the Midway Field, except the water that was brought in by the Chanslor-Canfield Midway Oil Company; that the Chanslor-Canfield Midway Oil Company had only enough water for its own use and a few immediate favored neighbors;

That the Stratton Water Company, during this period of time, attempted to increase their supply of water without any material result;

That representatives of the Mays Oil Company, during this period, visited affiant from two to eight times a day, urging affiant to maintain a steady supply of water at the drilling well, and to give them water for the other wells; that from the location of the water company's property, it was possible for [127] affiant to see the other wells, and that on many occasions when water was shut off from the well for the purpose of aiding some other property that was in difficulties, affiant could see the superintendent of the shut-down property getting into his conveyance to visit affiant and that thereupon affiant would turn the water into the line of that property, and thus satisfy the superintendent when he arrived, and as soon as the superintendent left, he would shut off the water again, so that by the time the superintendent returned to his property they would be without water;

That affiant does not now recall whether the operators of Section 2, Township 32 South, Range 23 East, M. D. M. & M. applied to the Stratton Water Company for water, but had they applied, it would not have been provided, as there was not sufficient water

to fill their engagements that had already been made; that it was practically impossible to haul water in wagons to the Mays Oil Company on account of the bad grade, which would have *titled* the water out of the wagons;

Affiant further states that when he first started operations in the Midway Field, it took three and a half days to make twelve and a half miles with teams loaded with lumber; that in hauling water, it cost fifty-five cents a barrel to haul the water, and the mules would drink half the water that was being hauled while they were getting it there.

E. W. KAY.

Subscribed and sworn to before me this 17th day of December, 1915.

FLORA HILL,
Notary Public in and for the City and County of San Francisco. [128]

Affidavit of Louis Titus, December 21, 1915.

State of California,
City and County of San Francisco,—ss.

Louis Titus, being first duly sworn, deposes and says:

That he is the President of the Consolidated Mutual Oil Company; that prior to the commencement of the above-entitled action, an application for patent was made to the Government of the United States for the quarter-section of land involved in said suit, and applicant made a final entry thereon and paid to the Government of the United States the sum of \$2.50 per acre therefor, for which a receipt was issued, and is

still uncanceled, and that said application for patent is still pending.

That the Consolidated Mutual Oil Company in good faith and for a valuable consideration, and believing that their predecessors in interest were diligently at work at the time of the withdrawal of September 27, 1909, and that they diligently continued at work until a discovery of oil was made, and believing that the location and title to said land was in all respects valid and having no notice or knowledge of any kind or character that there were any defects in said title, purchased a portion of said land, together with other land, and paid therefor a sum exceeding \$100,000 and since said time has expended thereon a sum in excess of \$100,000 in improving said land.

Affiant is informed and believes, and on that ground alleges, that the agents of the plaintiff have had said land under investigation, and in 1910 plaintiff had full knowledge of all matters alleged in the bill of complaint, but that no notice was given or claim made by the Government of the United States that said claim was not a valid claim.

LOUIS TITUS.

Subscribed and sworn to before me this 21st day of December, 1915.

JAMES L. ACH,

Notary Public in and for the City and County of San Francisco, State of California. [129]

Affidavit of Colin C. Rae.

State of California,
County of Los Angeles,—ss.

Colin C. Rae, being first duly sworn, deposes and says:

That he is now, and at all times herein mentioned was a citizen of the United States, over the age of twenty-one years; that his postoffice address is 1003 Higgins Building, in the city of Los Angeles, county and State aforesaid.

That he has investigated the conditions existing in the Midway Oil Fields, so called, in Kern County, from September 1, 1909, to and including July 2d, 1910, with reference to facilities for the drilling of oil wells, and affiant states that from his examination of the conditions existing at said time development was retarded and rendered costly and uncertain by lack of a proper water supply.

That on September 27th, 1909, the only companies selling water in the Midway Oil Fields were the Chanslor-Canfield Midway Oil Company and the Stratton Water Company.

That in 1905 the Chanslor-Canfield Midway Oil Company installed a 3-inch water-line from some water wells on Section 23-30-31, which is in the Santa Maria Valley, about 3 miles west of McKittrick, and ran the line along the foothills to Section 17-31-22, and then to what is known as the 25 Hill District in the Midway field. The wells were shallow, being only 70 or 80 feet deep and were dug in the earth.

That the Chanslor-Canfield Midway Oil Company,

in addition to supplying water for its own development, sold water to various consumers whose land was contiguous to said water-pipe line.

That the quantity of water called for was greater than the supply, and therefore, in the latter part of 1908 the Chanslor-Canfield [130] Company commenced the installation of a 6-inch pipe-line to take the place of the old 3-inch line. This line was finished in 1909, and was about 25 miles in length. When the line was completed it was found that the water wells would not produce sufficient water to supply the demand, and consequently the wells were deepened but with no better results.

That in April, 1909, the drilling of new wells was commenced and work continuously carried on until October, 1909, during which time 8 wells were completed, and with more or less success as to production of water.

That when said wells were completed it was found that the pump used to force the water through the 6-inch water-line was inadequate and a Snow pump was ordered from the East. This pump was put in operation in the latter part of August, 1909, but proved to be too small, and another *until* was ordered, but was not put in operation until about October, 1910, and until the new unit was installed the capacity of the line was not materially greater than the old 3-inch line which had been in use prior to building the new 6-inch line.

That in addition to the new water wells, pumps and lines, it was necessary to install several 2,000 barrel tanks, which was done at various points in the field,

as well as 3 100 h. p. boilers and several Luitweiler pumps, and that the cost of said water system was in the neighborhood of \$200,000.00.

That the number of consumers served by said Chanslor-Canfield Midway Oil Company was at no time in excess of 30, and during the period from September, 1909, to July 2d, 1910, there was constant trouble, and at many times an insufficient quantity of water for development purposes. [131]

That by reason of the insufficiency and uncertainty of the water supply, the development of oil wells was retarded.

That the Chanslor-Canfield Midway Oil Company distinctly stipulated with its consumers as to said uncertainty and assumed no liability in any way.

That at all times during said period there was a far greater demand for water than the Chanslor-Canfield Midway Oil Company could supply, and that said company actually had, at all times herein mentioned, a waiting list of individuals and companies who desired water for development purposes.

That the Stratton Water Company secured water from a well originally sunk for oil, in the northeast corner of Section 7, Township 32 South, Range 27 East.

That a 3-inch pipe-line, five miles in length from said well was run in a general southeasterly direction along the foot-hills to what is known as the 25 Hill District, in the Midway Field.

That the water sold by this company was not, as a matter of fact, fit for use in boilers.

That said company could not supply the demand

made upon it for water.

That the supply was uncertain and that development was actually stopped on several sections or portions thereof because of failure of water supply.

That by reason of the inability to obtain water in the Midway Field some of the larger companies put in private water systems at a large expenditure of money.

That in 1908, the Standard Oil Company investigated the various sources of water supply in the Midway Field, but could not obtain water for the operation of its pump station for development purposes.
[132]

That said Standard Oil Company in 1908 entered into a contract for the sinking of a water well on Section 1, Township 32 South, Range 23 East, M. D. B. & M.

That a well was sunk, but said company was not successful in developing a water supply from said well.

That said company being unable to secure water for the operation of its oil-pipe line and for the development of its properties, developed a water supply at Rio Bravo, a distance of 23 miles from Taft, Kern County, California, and brought water into the Midway Field through the said oil-pipe line.

That oil was pumped a few days to Rio Bravo, the line cleared and water pumped back from Rio Bravo to tanks in the Midway Field.

That this water was the only water used by Standard Oil Company for development work in Midway Fields; that this mode of supplying water was used

by said company until 1910, when a separate water-pipe line was constructed from Rio Bravo to the Midway Field.

That said company did not supply water to any other person or company, and based its refusal so to do on the ground that it did not have water enough for its own development and use.

That in order to carry on development work in the early part of 1909 the Honolulu Oil Company by reason of said universal scarcity of water, investigated possible sources of supply, and drilled a well for the purpose of securing a water supply near Buena Vista Lake.

That said company was not successful in securing suitable water for its said needs, and entered into negotiations with the Buena Vista Reservoir Association, and through a private arrangement secured water from said Buena Vista Lake, which was conveyed by means of a water-pipe line to the properties of the said Honolulu Oil Company in the Midway Field. [133]

That said water pipe line system was constructed at a cost of many thousands of dollars, and the Honolulu Oil Company did not furnish any person or company with water, giving as a reason the fact that the said water-pipe line would not supply any more than enough water for the use of said company.

That by reason of the inability of operators to secure water for development purposes and their great need therefor, a co-operative organization, known as the Kern Midway Water Company, was organ-

ized, and brought water in to said Midway Field in tank cars;

That at no time was the amount of water secured in this manner sufficient for the needs of the said organization.

That cars for said purpose were secured with great difficulty and that said supply was unreliable.

COLIN C. RAE.

Subscribed and sworn to before me this 16th day of December, 1915.

BERTHA L. MARTIN,
Notary Public in and for the County of Los Angeles,
State of California. [134]

Affidavit of C. H. Sherman, December 13, 1915.

State of California,
City and County of
San Francisco,—ss.

C. H. Sherman, being first duly sworn, deposes:

That he is and was at all times herein mentioned over the age of twenty-one years;

That in the early part of October, 1909, he entered the employ of the Mays Oil Company as manager, and was on and about Section 28, Township 31 South, Range 23 East, M. D. B. & M., at all times from thence forward, and up to the month of May, 1914;

That the predecessors in interest of said Mays Oil Company entered into the possession of the Northeast Quarter of said Section 28, Township 31 South, Range 23 East, M. D. B & M., under a mineral location made as provided by law prior to September 27, 1909;

That prior to said date, the derrick was erected on said quarter section for the purpose of drilling for oil, and the work of development on the well was actually commenced prior to September 27, 1909, and thereafter the work tending to discovery of oil was continued diligently by occupants in good faith until oil was discovered in July, 1912, as hereinafter more particularly set out;

That many difficulties were encountered in the actual drilling of said well which the occupants sought diligently and continuously to overcome, but in spite of the continued diligence of the operators delayed the completion of the work; that the difficulties referred to arose chiefly in the getting of casing and other materials necessary in drilling a well, and in the shortage of water; that the period from September, 1909, to August, 1910, was a period of great development in the Midway Field, and at the time of the inception of the said work, practically no water was available; [135]

That concurrently with the inception of work on said Northeast Quarter, the occupants were also working on the Northwest Quarter and on the Southwest Quarter of the Section; that the only source of water which was available to the occupants of said land was the water furnished by the Stratton Water Company, whose wells were situated on Section 7, Township 32 South, Range 23 East M. D. B. & M., and in order to get such water, it had been necessary for the Mays Oil Company to run a water-line about five miles in length to the source of the water supply; that the line was two inches in diameter and the total

amount of water which could be obtained from the Stratton Water Company was at no time *time* sufficient to drill more than one well, and that on many occasions the available supply of water was not even sufficient for that purpose, to such an extent that, during the month of August, 1909, the well on the Southwest Quarter was shut down for sixteen days by reason of the inability to get sufficient water to carry on the operations;

That a large and continuous supply of water is absolutely essential for the drilling of oil-wells in the Midway Field, and the failure of the supply of water inevitably results in the sticking of the casing, and thereby in the loss of a string of casing which costs the company anywhere from \$3,000 to \$6,500, depending on the depth at which it is lost;

That in said well on the Southwest Quarter, by reason of the uncertainty of said water supply, a string of casing was lost, and finally resulted in the entire loss of the hole and necessitated moving the derrick and commencing a new well;

That it is absolutely impossible to start drilling of a well unless a sufficient and continuous supply of water is assured; that during all periods, constant and persistent efforts were made by the Mays Oil Company to secure an adequate supply of [136] water, and as soon as an adequate supply of water was available, the drilling of the wells was pursued continuously and with the greatest diligence;

That during said period of time, affiant was handicapped in his operations by constant failing of the water supply, and called at the headquarters of the

Stratton Water Company three or four times every day, and often during the early hours of the morning in the persistent endeavor to urge said Stratton Water Company to supply the property with sufficient water, but notwithstanding such efforts, it was never possible to drill more than one well on account of the inability of the Stratton Water Company to furnish water;

That during the period up to January 1st, 1909, there was expended in the development of the said land a sum of money exceeding \$5,800, and that during the year 1910 there was expended in developing the land a sum of money exceeding \$13,100, and thereafter until oil was discovered, a further sum was expended on said land exceeding \$26,500; that thereafter there was expended on said land in 1913 the sum of \$338,706.46;

That the Northeast Quarter, the Northwest Quarter and the Southwest Quarter of said Section were all located as placer mining claims, and constituted a group of claims lying contiguous and owned by the same persons, and that all labor done on — of said claims for the discovery of oil tended to the development to determine the oil-bearing character of the contiguous claims; that the wells on said claims were all grouped about the point of contact of said three claims, that is, near the center point of said Section 28; [137]

That during all of the periods herein mentioned, the actual work of drilling a well was continuously and diligently carried on on the Southwest Quarter; that on said three claims, up to December 31, 1909,

there was work done tending to the discovery of oil in all costing in excess of \$43,000; that during the year 1910, there was expended on said three claims, tending to the discovery of oil, a sum exceeding \$59,000; that during the year 1911, there was expended on said three claims a sum exceeding \$90,900;

That the Record ——— Company, by itself, its grantors and those claiming under it, have been in the open, notorious, adverse, and exclusive possession of said Northeast Quarter of said Section for more than five years preceding the commencement of the above-entitled action, and that they were diligently at work in good faith drilling a well for oil on said land between June 26, 1910, and July 2, 1910, and thereafter diligently continued such work until discovery of oil was made.

C. H. SHERMAN.

Subscribed and sworn to before me this 13th day of December, 1915.

[Seal]

ANNE F. HASTY,

Notary Public in and for the City and County of San Francisco, State of California. [138]

Order Permitting Withdrawal of Affidavit of C. H. Sherman, etc.

It appearing to the Court that two affidavits of C. H. Sherman have been filed upon motion for the appointment of a receiver in the above-entitled action, one dated the 13th day of December, 1915, and the other the 27th day of December, 1915.

And it further appearing that the first of said affidavits was prepared in the office of A. L. Weil, Esq., attorney for defendant Consolidated Mutual Oil

Company, and that a copy thereof was thereafter submitted to Charles S. Wheeler, Esq., of counsel for said defendant, in order that he should pass upon the same before the same was to be filed; and it appearing that the said Charles S. Wheeler, Esq., in connection with the said Sherman investigated drilling records of the said Mays Oil Company, and said C. H. Sherman thereupon discovered that he had erred in stating that drilling of a well on the Northeast Quarter had started in 1910, and that the correct date should be 1911.

And it appearing that the second affidavit was prepared in the office of the said Charles S. Wheeler, Esq., and that in said affidavit said date was corrected and that it was intended to file said second affidavit and not to file the said first affidavit, but that said first affidavit was inadvertently sent to Los Angeles for filing from the office of said A. L. Weil, Esq.; and counsel having made the foregoing representations to the Court and having asked the Court for an order permitting them to withdraw the said first affidavit of the said Sherman, and it appearing to the Court that it is proper that the said first affidavit should under the circumstances be withdrawn,

NOW, THEREFORE, IT IS ORDERED that the said first affidavit of said C. H. Sherman may be withdrawn and the same hereby is stricken from the record.

Dated January 18th, 1916.

M. T. DOOLING,
Judge. [139]

Affidavit of C. R. Stevens.

State of California,

County of Los Angeles,—ss.

C. R. Stevens, being first duly sworn, deposes and says:

That he is a citizen of the United States, over the age of twenty-one years; that his postoffice address is 1003 Higgins Building, in the City of Los Angeles, county and State aforesaid;

That from September 1st, 1909, to March 1st, 1910, the oil well supplies sold by the supply houses in Taft, Kern County, California, had increased from approximately \$125,000, during the month of September, to approximately \$600,000, during February, 1910; that thereafter and up to September 1st, 1910, the approximate sales of oil well supplies by the combined supply houses at Taft exceeded \$750,000, per month; that these figures do not include the purchase of lumber in immense quantities for rigs and other building purposes. nor do these figures include direct purchases by large operating companies such as the Standard Oil Company, Associated Oil Company, Union Oil Company, Kern Trading & Oil Company, and other companies purchasing material direct at other points for shipment into the Midway Field;

That the various supply houses, as well as other large companies purchasing direct, experienced great difficulty in securing deliveries of oil well supplies from manufacturers in the East, particularly

of casing and boilers, as said manufacturers had not anticipated the enormous increase in demand;

That because of the enormous increase in demand for oil well supplies, including lumber, during the period hereinbefore mentioned, the railroad companies were unable to expeditiously [140] handle freight and as a result there was, particularly during the early part of 1910, congestion of cars at Bakersfield, the railroad companies being unable to clear through to Taft; that during the months of February and March, 1910, there were more than two hundred (200) cars of material congested at Bakersfield awaiting clearance for Taft; that because of the activity in the Midway Field the office force of the Sunset Railway Company at Taft was increased, during the time above mentioned, from two to twenty-six men.

C. R. STEVENS.

Subscribed and sworn to before me, this 16th day of December, 1915.

BERTHA L. MARTIN,
Notary Public in and for the County of Los Angeles,
State of California. [141]

Order Approving Statement of Evidence.

It appearing to the Court that Notice of Lodgment of Statement of Evidence on Appeal in behalf of appellants Consolidated Mutual Oil Company and J. M. McLeod was given to the solicitors for the plaintiff above named on the 15th day of March, 1916.

And it further appearing that on the 20th day of

March, 1916, said plaintiff served on the solicitors for said appellants a copy of its proposed amendments to said Statement of Evidence, wherein said plaintiff requested that there be included in said Statement of Evidence the affidavit of C. R. Stevens, dated the 16th day of December, 1915, and the affidavit of C. H. Sherman, dated the 13th day of December, 1915.

And it appearing that by order of this Court dated the 18th day of January, 1916, said affidavit of C. H. Sherman was withdrawn and stricken from the record on motion made by counsel for said appellants in open court, but which said motion was made without notice to said plaintiff.

And it being the fact that the Court did not treat as in evidence or consider the said affidavit so stricken out, in making the interlocutory order appointing a receiver, but counsel for appellants consenting to the insertion of said affidavit so stricken, if accompanied by the foregoing recitals, and the plaintiff consenting,

NOW, THEREFORE, the said proposed amendments of plaintiff are allowed and said affidavits of C. R. Stevens and C. H. Sherman, together with the Order Permitting Withdrawal [142] of Affidavit of C. H. Sherman, shall be included in said Statement of Evidence; and the said statement as amended being found to be full, true, and correct, the same is hereby approved.

Dated March 29, 1916.

M. T. DOOLING,
Judge.

[Endorsed]: No. A-41—Equity. In the United States District Court for the Southern District of California. United States of America, Plaintiff, vs. Record Oil Company et al., Defendants. Statement of Evidence to be Included in Transcript on Appeal. Lodged Mar. 16, 1916. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Filed Apr. 1, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. U. T. Clotfelter, A. L. Weil, Charles S. Wheeler and John F. Bowie, Attorneys for Defendant Consolidated Mutual Oil Co. Union Trust Building, San Francisco. Due Service and Receipt of a copy of the Within Statement of Evidence and Amendments this 20th day of March, 1916, is hereby admitted. A. E. Campbell, Attorney for Plff. [143]

In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit.

No. A-41—EQUITY.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RECORD OIL COMPANY et al.,

Defendants.

Stipulation on Severance.

WHEREAS, a judgment or order has been made and entered appointing a receiver in the above-entitled action; and,

WHEREAS, the defendants Consolidated Mutual Oil Company and J. M. McLeod desire and intend to appeal therefrom; and,

WHEREAS, the defendants Record Oil Company, Associated Oil Company, Standard Oil Company, and General Petroleum Company do not desire or intend to appeal from such order; and,

WHEREAS, under such circumstances it is proper that an order of severance be made permitting the said defendants Consolidated Mutual Oil Company and J. M. McLeod to prosecute their appeals without joining the other defendants,

NOW, THEREFORE, IT IS HEREBY STIPULATED that such an order may be made; and it is further stipulated that notice to appear on the application for order allowing appeal be, and the same is hereby waived.

A. L. WEIL,
U. T. COLTFELTER, and
CHARLES S. WHEELER and
JOHN F. BOWIE,

Attorneys for Defendant Consolidated Mutual Oil Company.

OSCAR LAWLER,
P. W.,

Attorney for Defendant, J. M. McLeod. [144]

OSCAR SUTRO and
PILLSBURY, MADISON & SUTRO,
Attorneys for Defendant Standard Oil Company.

OSCAR LAWLER and
U. T. CLOTFELTER,
Attorneys for Defendant Record Oil Company.

EDMUND TAUSZKY,

Attorney for Associated Oil Company, Defendant
Above-named.

A. L. WEIL,

Attorney for Defendant General Petroleum Com-
pany.

Order for Severance.

Pursuant to the foregoing stipulation, IT IS
HEREBY ORDERED that Consolidated Mutual Oil
Company and J. M. McLeod, defendants above-
named, be allowed to prosecute their appeal without
joining the other defendants.

Dated March 3, 1916.

M. T. DOOLING,

Judge.

[Endorsed]: Original. No. A-41—Equity. In
the United States District Court for the Southern
District of California. United States of America,
Plaintiff, vs. Record Oil Company, et al., Defendants.
Stipulation on Severance. Filed Mar. 4, 1916. Wm.
M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy
Clerk. Charles S. Wheeler, Attorney for Defendant
Consolidated Mutual Oil Co., Union Trust Building,
San Francisco. [145]

*In the District Court of the United States, for the
Southern District of California, Northern Di-
vision, Ninth Circuit.*

No. A-41—EQUITY.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RECORD OIL COMPANY, CONSOLIDATED
MUTUAL OIL COMPANY, MAYS CON-
SOLIDATED OIL COMPANY, J. M. Mc-
LEOD, LOUIS TITUS, NORTH AMERICAN
OIL CONSOLIDATED, STANDARD OIL
COMPANY, GENERAL PETROLEUM
COMPANY, ASSOCIATED OIL COMPANY
and L. B. McMURTRY,

Defendants.

Petition for Appeal and Order Allowing Appeal.

To the Honorable Court Above-entitled:

Consolidated Mutual Oil Company, a corporation,
and J. M. McLeod, defendants in the above-entitled
action, considering themselves aggrieved by the or-
der made in the above-entitled cause on the 3d day
of February, 1916, by which said order a receiver
was appointed, said order being an interlocutory or-
der appointing a receiver, hereby appealed from
said decree or order to the United States Circuit
Court of Appeals for the Ninth Circuit, for the rea-
sons specified in their Assignment of Errors filed
herewith, and pray that their appeal may be allowed,

and that a transcript of the record, proceedings and papers upon which such decree was made and entered as aforesaid, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California.

And your petitioners further pray that the proper order [146] touching the security to be required to perfect their appeal be made.

OSCAR LAWLER,
P. W.,

Solicitor for Defendant J. M. McLeod.

CHARLES S. WHEELER and
JOHN F. BOWIE,

P. W.,

A. L. WEIL,

P. W.,

U. T. CLOTFELTER,

P. W.,

Solicitors for Defendant Consolidated Mutual Oil
Company.

Order Allowing Appeal.

The foregoing petition for appeal is hereby granted and allowed, and the bond on appeal to be given on behalf of the above-named appellants is hereby fixed at \$500 to be conditioned according to law.

Dated March 3, 1916.

M. T. DOOLING,
Judge.

Due service and receipt of a copy of the within

Petition for Appeal this 3d day of March, 1916, is hereby admitted.

E. J. JUSTICE,
ALBERT SCHOONOVER,
A. E. CAMPBELL,
FRANK HALL,

Attorneys for Plaintiff.

[Endorsed]: Original. No. A-41—Equity. In the United States District Court for the Southern District of California. United States of America, Plaintiff, vs. Record Oil Company, et al., Defendants. Petition for Appeal and Order Allowing Appeal. Filed Mar. 4, 1916. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. U. T. Clotfelter, A. L. Weil, Charles S. Wheeler and John F. Bowie, Attorneys for Defendant Consolidated Mutual Oil Co., Union Trust Building, San Francisco. [147]

In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit.

No. A-41—EQUITY.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RECORD OIL COMPANY, CONSOLIDATED
MUTUAL OIL COMPANY, MAYS CON-
SOLIDATED OIL COMPANY, J. M. Mc-
LEOD, LOUIS TITUS, NORTH AMERICAN

OIL CONSOLIDATED, STANDARD OIL
COMPANY, GENERAL PETROLEUM
COMPANY, ASSOCIATED OIL COMPANY
and L. B. McMURTRY,

Defendants.

Assignment of Errors.

Now comes the defendants Consolidated Mutual Oil Company and J. M. McLeod, by their solicitors A. L. Weil, U. T. Clotfelter, and Charles S. Wheeler and John F. Bowie, Esq., and Oscar Lawler, Esq., and aver that the interlocutory decree entered in the above-entitled action on the 3d day of February, 1916, to wit, the interlocutory decree appointing a receiver, is erroneous and unjust to the said defendants, and file with their petition for appeal from said decree the following Assignment of Errors, and specify that said decree is erroneous in each and every of the following particulars, viz:

I. The District Court of the United States, for the Southern District of California, erred in appointing a receiver upon the pleadings, evidence and proofs before the Court.

II. The District Court of the United States, for the Southern District of California, erred in appointing a receiver in this action, for the reason that no right to the possession of the real property involved is shown to be in plaintiff, and plaintiff [148] did not show any probability that plaintiff was entitled to or would or could recover said real property or the possession thereof, and that the appointment of a receiver herein under the circumstances appearing is

not in conformity with the rules and principles of equity.

III. The District Court of the United States, for the Southern District of California, erred in appointing a receiver for the reason that the evidence before the Court shows the fact to be that the land in controversy was on the 27th day of September, 1909, covered by a placer mining location or claim, which location or claim belonged on said date to the defendant McLeod; that the said location or claim was on said 27th day of September, 1909, an existing valid location or claim within the meaning of the President's withdrawal order of said date; that on said 27th day of September, 1909, the said McLeod, by himself and his lessees was in the actual, exclusive and peaceable possession of the whole of said location or claim, and by himself and his lessees was on said day diligently engaged in the prosecution of work leading to a discovery of oil or gas on said location or claim; that said work was at all times thereafter duly and diligently prosecuted, and resulted in the discovery of both oil and gas on said claim or location, thereby perfecting the same as a mining claim; that said McLeod is the owner of said perfected location and that defendant Consolidated Mutual Oil Company was in possession of a part thereof under a valid lease from the said McLeod; that plaintiff is without any equitable right or title whatever to the said land, and the appointment of a receiver under the circumstances is not conformable to the practice and rules of equity.

IV. The District Court of the United States, for the Southern District of California, erred in appointing a receiver, for the reason that the evidence before the Court makes it clear [149] that on the 27th day of September, 1909, the defendant McLeod, by himself and his lessees, was the *bona fide* occupant and claimant of the land in controversy; that said land was and is oil or gas bearing land; that the said McLeod by himself and his lessees was in diligent prosecution of work leading to discovery of oil or gas on said quarter section of land; that thereafter said McLeod, by himself and his lessees, continued in diligent prosecution of said work until gas and oil were discovered thereon, and that oil and gas were discovered thereon long prior to the commencement of this action, and that the said McLeod, by himself and his lessees, has ever since continued to be such occupant and claimant and has continued in diligent prosecution of like work thereon; that the plaintiff has no equitable right or claim whatsoever in or to said property and that the appointment of a Receiver under the circumstances is not in conformity with the rules and practice of equity.

V. The District Court of the United States for the Southern District of California, erred in treating the complaint as an affidavit and in considering the alleged facts therein set forth as evidence of a probable or any right in plaintiff, for the reason that said complaint was not so verified that the same could be used for such purpose, inasmuch as it appears that the affiant had no personal knowledge of any

facts alleged, which facts if true, would tend to destroy the validity of the titles, rights, interests or claims of these defendants in and to said land, but that such allegations are mere hearsay based upon the statements and examinations and affidavits of third persons.

WHEREFORE, appellants pray that said interlocutory decree be reversed, and that said District Court for the Southern District of California, Northern Division, be ordered to enter a [150] decree reversing the decision of the lower court in said action.

OSCAR LAWLER,
P. W.

Solicitor for Defendant and Appellant J. M. McLeod.

A. L. WEIL,
P. W.

U. T. CLOTFELTER,
P. W.

CHARLES S. WHEELER and
JOHN F. BOWIE,

Solicitors for Defendant and Appellant Consolidated Mutual Oil Company.

[Endorsed]: Due service and receipt of a copy of the within Assignment of Errors, this 3d day of March, 1916, is hereby admitted.

E. J. JUSTICE,
ALBERT SCHOONOVER,
A. E. CAMPBELL,
FRANK HALL,

Attorneys for Plaintiff.

Original. No. A-41—Equity. In the United States District Court for the Southern District of California. United States of America, Plaintiff, vs. Record Oil Company, et al., Defendants. Assignment of Errors. Filed Mar. 4, 1916. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. U. T. Clotfelter, A. L. Weil, and Charles S. Wheeler, John F. Bowie, Attorneys for Defendant, Consolidated Mutual Oil Co., Union Trust Building, San Francisco. [151]

In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit.

No. A-41—EQUITY.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RECORD OIL COMPANY, CONSOLIDATED
MUTUAL OIL COMPANY, MAYS CON-
SOLIDATED OIL COMPANY, J. M. Mc-
LEOD, LOUIS TITUS, NORTH AMERI-
CAN OIL CONSOLIDATED, STANDARD
OIL COMPANY, GENERAL PETRO-
LEUM COMPANY, ASSOCIATED OIL
COMPANY and L. B. McMURTRY,

Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:

That the undersigned, Massachusetts Bonding and Insurance Company, as surety, is held and firmly

bound unto United States of America in the sum of Five hundred and no/100 (\$500) Dollars, lawful money of the United States, to be paid to said United States of America, to which payment, well and truly to be made, we bind ourselves, and our successors, by these presents.

Sealed with our seals and dated this 3d day of March, 1916.

WHEREAS, the above mentioned Consolidated Mutual Oil Company and J. M. McLeod have obtained an appeal to the Circuit Court of Appeals of the United States to correct or reverse the order or decree of the District Court of the United States, for the Southern District of California, Northern Division, in the above-entitled cause.

NOW, THEREFORE, the condition of this obligation is such that if the above-named Consolidated Mutual Oil Company and J. M. McLeod shall prosecute their said appeal to effect, and answer [152] all costs if they fail to make good their plea, then this obligation shall be void ; otherwise to remain in full force and effect.

MASSACHUSETTS BONDING AND INSURANCE COMPANY. [Seal]

By FRANK (?) M. HALL,

S. M. PALMER,

Attorneys in Fact.

The within bond is approved both as to sufficiency and form this 3 day of March, 1916.

M. T. DOOLING,

Judge.

[Endorsed]: No. A-41. In the United States District Court for the Northern District of California U. S. of America, Plaintiff, vs. Record Oil Company et al., Defendant. Bond on Appeal. Filed Mar. 4, 1916. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Charles S. Wheeler, Attorney for ——— Union Trust Building, San Francisco. [153]

In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit.

No. A-41—EQUITY.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RECORD OIL COMPANY, CONSOLIDATED
MUTUAL OIL COMPANY, MAYS CON-
SOLIDATED OIL COMPANY, J. M. Mc-
LEOD, LOUIS TITUS, NORTH AMERI-
CAN OIL CONSOLIDATED, STANDARD
OIL COMPANY, GENERAL PETRO-
LEUM COMPANY, ASSOCIATED OIL
COMPANY and L. B. McMURTRY,

Defendants.

Praeceptum for Transcript on Appeal.

To the Clerk of the Above-entitled Court.

Please make up, print, and issue in the above-entitled cause a certified transcript of the record, upon an appeal allowed in this cause, to the Circuit Court of Appeals of the United States, for the Ninth

Circuit, sitting at San Francisco, California; the said transcript to include the following:

Bill of Complaint;

Answer of Defendant Consolidated Mutual Oil Company;

Answer of Defendant J. M. McLeod;

Notice of Motion for Receiver and Restraining Order;

Order Directing the Appointment of a Receiver; together with opinions in cases A-2 and A-38 referred to therein;

Order Appointing Receiver;

Petition for Appeal; Order Allowing Appeal;

Assignment of Errors; [154]

Bond on Appeal;

Citation;

Stipulation on Severance;

Statement of Evidence on Appeal;

Notice of Lodgment of Statement of Evidence;

Praecipe for Transcript on Appeal.

You will please transmit to the Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, the said record when prepared, together with the original citation on appeal.

OSCAR LAWLER,

Solicitor for Defendant and Appellant, J. M. McLeod.

U. T. CLOTFELTER,

A. L. WEIL,

CHARLES S. WHEELER and

JOHN F. BOWIE,

Solicitors for Defendant and Appellant Consolidated Mutual Oil Company.

Due service and receipt of a copy of the within Praecipe for Transcript this 15th day of March, 1916, is hereby admitted.

E. J. JUSTICE,
ALBERT SCHOONOVER,
A. E. CAMPBELL,
FRANK HALL,

Attorneys for Plaintiff.

[Endorsed]: No. A-41—Equity. In the United States District Court for the Southern District of California. United States of America, Plaintiff, vs. Record Oil Company, et al., Defendants. Praecipe for Transcript on Appeal. Filed Mar. 16, 1916. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. U. T. Clotfelter, A. L. Weil, Charles S. Wheeler, and John F. Bowie, Attorneys for Defendant, Consolidated Mutual Oil Co., Union Trust Building, San Francisco. [155]

*In the District Court of the United States, for the
Southern District of California, Northern
Division, Ninth Circuit.*

No. A-41—IN EQUITY.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RECORD OIL COMPANY, CONSOLIDATED
MUTUAL OIL COMPANY, MAYS CON-
SOLIDATED OIL COMPANY, J. M. Mc-
LEOD, LOUIS TITUS, NORTH AMERI-

CAN OIL CONSOLIDATED, STANDARD
OIL COMPANY, GENERAL PETRO-
LEUM COMPANY, ASSOCIATED OIL
COMPANY and L. B. McMURTRY,

Defendants.

**Praeipie for Additional Portions of the Record to be
Incorporated into the Transcript on Appeal.**

To the Clerk of the Above-entitled Court:

Please incorporate into the transcript of the record upon the appeal allowed in this cause to the Circuit Court of Appeals of the United States for the Ninth Circuit, sitting at San Francisco, California, the following in addition to those portions of the record already requested by the solicitors for the defendants and appellants, to wit:

The order allowing to plaintiff to submit its motion for receiver and restraining order upon the verified pleadings and affidavits.

You will please transmit to the Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, the portion of the record herein indicated, at the same time and in the same manner as you transmit the portions of the record indicated by the praecipe heretofore [156] filed by the Solicitors for defendants and appellants.

Dated March 18, 1916.

E. J. JUSTICE,
ALBERT SCHOONOVER,
FRANK HALL,
A. E. CAMPBELL,

Solicitors for the United States of America, Plaintiff
and Appellee.

Due service and receipt of a copy of the within Praeceptum for Additional Portions of the Record to be Incorporated into the Transcript on Appeal, this 20th day of March, 1916, is hereby admitted.

U. T. CLOTFELTER,
A. L. WEIL,
CHARLES S. WHEELER and
JOHN F. BOWIE,
OSCAR LAWLER,

Solicitors for the Defendants and Appellants.

[Endorsed]: No. A-41. In the District Court of the United States for the Southern District of California. United States of America, Plaintiff, vs. Record Oil Company, Consolidated Mutual Oil Company, et al., Defendants. Praeceptum for Additional Portions of the Record to be Incorporated into the Transcript on Appeal. Filed Mar. 22, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [157]

*In the District Court of the United States, in and for
the Southern District of California, Northern
Division.*

No. A-41—EQUITY.

THE UNITED STATES OF AMERICA,
Complainants,

vs.

RECORD OIL COMPANY, CONSOLIDATED
MUTUAL OIL COMPANY, MAYS CON-
SOLIDATED OIL COMPANY, J. M. Mc-

LEOD, LOUIS TITUS, NORTH AMERICAN OIL CONSOLIDATED, STANDARD OIL COMPANY, GENERAL PETROLEUM COMPANY, ASSOCIATED OIL COMPANY and L. B. McMURTRY,

Defendants.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing one hundred and fifty-seven (157) typewritten pages, numbered from 1 to 157, inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the Bill of Complaint, Answer of defendant, Consolidated Mutual Oil Company, Answer of defendant, J. M. McLeod, Notices of Motion for Receiver and Restraining Order, Order Submitting Motion on Affidavits, Order Submitting Motion on Verified Pleadings, etc., Order Directing Appointment of Receiver, Order Appointing Receiver, Notice of Lodgment of Statement of Evidence, Statement of Evidence on Appeal, Stipulation on Severance, Petition for Appeal and Order Allowing Appeal, Assignment of Errors, Bond on Appeal, Praecipe for Transcript on Appeal, and Praecipe for Additional Portions of [158] Record to be Included in Transcript on Appeal, all the above and therein-above entitled action, and of the Opinion of the Court in case A-2—Equity, referred to in Order directing appointment of receiver in this

cause, and of the Opinion of the Court in case A-38—Equity, referred to in Order directing appointment of receiver in this cause, and that the same together constitute the record on appeal in this cause, as specified in the aforesaid Praecipe for Transcript on Appeal and Praecipe for Additional Portions of Record to be included in Transcript on Appeal, filed in my office on behalf of the appellants by their solicitors of record, and on behalf of the appellees by their solicitors of record, respectively.

I do further certify that the cost of the foregoing record is \$83 80/100, the amount whereof has been paid me by Consolidated Mutual Oil Company, a Corporation, and L. M. McLeod, the appellants herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court of the United States of America, in and for the Southern District of California, Northern Division, this 28th day of April in the year of our Lord one thousand nine hundred and sixteen, and of our Independence the one hundred and fortieth.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States for
the Southern District of California,

By Leslie S. Colyer,

Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled
4/28/16. L. S. C.] [159]

[Endorsed]: No. 2787. United States Circuit Court of Appeals for the Ninth Circuit. Consolidated Mutual Oil Company, a Corporation, and J. M. McLeod, Appellants, vs. The United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California, Southern Division. Filed May 1, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*In the District Court of the United States, for the
Southern District of California, Northern Di-
vision.*

No. A-41.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RECORD OIL COMPANY, et al.,

Defendants.

**Stipulation and Order Enlarging Time to May 1,
1916, to File Transcript, etc.**

IT IS HEREBY STIPULATED that the appellants herein may have to and including the first day of May, 1916, within which to prepare and file their Transcript on Appeal in the above-entitled proceeding.

Dated April 15th, 1916.

E. J. JUSTICE,
A. E. CAMPBELL,
FRANK HALL,
Solicitors for Plaintiff.

It is so ordered.

WM. W. MORROW,
United States Circuit Judge, Ninth Judicial Cir-
cuit.

[Endorsed]: No. A-41. In the United States Dis-
trict Court for the Southern District of California.
United States of America, Plaintiff, vs. Record Oil
Company, et al., Defendants. Stipulation.

No. ——. United States Circuit Court of Appeals
for the Ninth Circuit. Stipulation and Order Under
Rule 16 Enlarging Time to May 1, 1916, to File
Record thereof and to Docket Case. Filed Apr. 15,
1916. F. D. Monckton Clerk.

*In the United States Circuit Court of Appeals, Ninth
Judicial Circuit.*

RECORD OIL COMPANY, CONSOLIDATED
MUTUAL OIL COMPANY, MAYS CON-
SOLIDATED OIL COMPANY, J. M. Mc-
LEOD, LOUIS TITUS, NORTH AMERICAN
OIL CONSOLIDATED, STANDARD OIL
COMPANY, GENERAL PETROLEUM
COMPANY, ASSOCIATED OIL COMPANY
and L. B. McMURTRY,

Appellants,

vs.

UNITED STATES OF AMERICA.

Appellee.

**Order Extending Time to June 1, 1916, to File
Transcript, etc.**

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said appellants to docket said cause and file the record thereof, with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby enlarged and extended to and including the first day of June, 1916.

Dated at Los Angeles, California, March 13, 1916.

M. T. DOOLING,
U. S. District Judge.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Record Oil Company, Consolidated, et al., Appellants, vs. United States of America, Appellees. Order Extending Time to File Record. Filed Mar. 20, 1916. F. D. Monckton, Clerk.

[Endorsed]: No. 2787. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to ——— to File Record Thereof and to Docket Case. Re-filed May 1, 1916. F. D. Monckton, Clerk.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

CONSOLIDATED MUTUAL OIL COMPANY, a
Corporation, and J. M. McLEOD,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

No. 2787

CONSOLIDATED MUTUAL OIL COMPANY, a
Corporation, and J. M. McLEOD,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

No. 2788

Brief in Behalf of Appellants.

A. L. WEIL,
U. T. CLOTFELTER,
CHARLES S. WHEELER and
JOHN F. BOWIE,
Attorneys for Appellants.

CHARLES S. WHEELER,
Of Counsel.

Filed

OCT 17 1916

Filed this.....day of October, 1916, **F. D. Monckton**
FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

The James H. Barry Co.,
San Francisco

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

CONSOLIDATED MUTUAL OIL COMPANY, a Corporation, and J. M. McLEOD, <div style="text-align: right;"><i>Appellants,</i></div> vs. THE UNITED STATES OF AMERICA, <div style="text-align: right;"><i>Appellee.</i></div>	}	No. 2787
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CONSOLIDATED MUTUAL OIL COMPANY, a Corporation, and J. M. McLEOD, <div style="text-align: right;"><i>Appellants,</i></div> vs. THE UNITED STATES OF AMERICA, <div style="text-align: right;"><i>Appellee.</i></div>	}	No. 2788
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BRIEF IN BEHALF OF APPELLANTS.

Each of these appeals is from an order appointing a Receiver.

The Government asserts in its bill of complaint in each case that the oil lands in controversy were withdrawn from location and entry by President Taft's withdrawal order of September 27, 1909; while appellants insist that the locations under which

they claim, were valid and existing locations or claims at the date of the withdrawal order and that therefore these lands were by the provisions of the withdrawal order itself excluded from the area so withdrawn.

Appellants further insist that wholly aside from the foregoing proposition their right to these locations is in any event preserved to them by the remedial statute approved June 25, 1910, commonly known as the Pickett Bill.

These two propositions will be considered in their order and we shall also discuss in its proper place the bearing of a further allegation in the bills of complaint to the effect that the locators under whom appellants claim were mere "dummies":

I.

APPELLANTS' RIGHTS AS MEASURED BY THE TAFT WITHDRAWAL ORDER.

A mining location upon the public lands confers no rights prior to actual discovery which Congress is bound to respect.

The locator may have been long in possession, going ahead in the utmost good faith in work intended to bring about a discovery; he may have been expending vast sums in the construction of permanent improvements, and his hand may be within reach of the coveted treasure; and yet Congress, if it sees fit

to exercise its powers ruthlessly, can with a word drive him from the land and confiscate his permanent improvements together with all of the benefits of his labors and expenditures.

This arbitrary power Congress can exercise, "however inequitable such a course might be."

McLemore v. Express Oil Co., 168 Cal., 559.

And what Congress can do in this particular, the President also has the power to do with a mere stroke of his pen.

United States v. Midwest Oil Co., 236 U. S., 459.

The question before the Court is, therefore, not what President Taft could have done with appellants' claims had he seen fit to do it. We are here concerned only with what the President did actually intend to do and actually did do with locations which were in a situation such as were appellants' claims at the date of the Taft withdrawal order.

Upon none of our claims had there been a discovery of oil or gas on September 27, 1909. If, therefore, the President's language is held by this Court to refer only to perfected claims,—that is, to claims perfected by discovery and hence already vested and valid against the government and the world,—these appellants are out of court so far as this branch of the discussion is concerned.

But such, we insist, was not the President's actual

intent, and such is not the interpretation called for by, or properly to be given to, the language he has used. The President's words are these:

"All locations or claims existing and valid at this date may proceed to entry, etc."

What constituted an "existing and valid" claim or location at said date within the proper interpretation of these words?

This Court well knows that it has long been the law, applicable alike to claims located for metalliferous minerals and also to those located for oil, that prior to discovery the locator in possession who is duly diligent in his effort toward discovery has valuable possessory and other rights which the courts will recognize and protect against hostile intrusion by private individuals.

Crossman v. Pendery, 8 Fed., 693;

Rooney v. Barnette, 200 Fed., 700;

Hullinger v. Big Sespe Oil Co., 28 Cal. App., 69;

Miller v. Chrisman, 140 Cal., 440.

That such possession, though accompanied by due diligence in an effort to effect discovery, gives no vested rights as against the Government, and hence affords no positive assurance that the arbitrary power of Congress or of the President will not be exercised, we have already conceded. That as a matter of proper verbiage such locations or claims could not

as against the Government be called "*perfected*" locations must also be admitted. But it is nevertheless just as true that in the accepted usage of the English language, claims initiated by location notice and in possession of a diligent claimant are properly designated and are generally known as "locations" or "claims." The language employed in the following cases will be found to afford abundant examples of this usage.

Miller v. Chrisman, 140 Cal., 440, 447;

Cosmos, etc. Co. v. Gray Eagle Oil Co., 112 Fed., 4, 14.

Nor can it be doubted that good usage demands that some such phrase as "*perfected* claim or location" be used whenever the intention is to restrict the meaning of said words to such claims only as have been perfected by discovery.

Smith v. Union Oil Co., 166 Cal., 217, 224.

A location or claim of a character so substantial that the courts will recognize and protect it, cannot, of course, properly be said to be without existence or validity.

Hullinger v. Big Sespe Oil Co., 28 Cal. App., 69, 73.

We thus see that the phrase "locations or claims existing and valid at this date," which President Taft employed in the said order, is comprehensive and will

properly include a location or claim not perfected by discovery of oil at the date of the order, but which is nevertheless of such a substantial character that the courts would recognize and protect it. And we further know it to have been the law at the date of said order that the courts would recognize and protect such oil locations or claims only as were accompanied both by a *pedis possessio*, and due diligence looking to a discovery.

To us it seems very clear that as a matter of actual fact, President Taft had no thought of striking down the rights of claimants whose moral claims were very great and whose failure to perfect their claims was due wholly to the fact that Nature had not been as responsive to their efforts as she had been again and again in the cases of their neighbors, who perhaps had shown far less diligence and whose outlays had been relatively insignificant. In this connection we point to the general situation in the oil fields on September 27, 1909, which the President must have understood. It was and is commonly known that at that date there were many claims unperfected by discovery upon which the locators were actually at work and had expended large amounts of capital and physical and mental labor and energy in their quest for oil. So, too, the President must have realized the capriciousness of Nature in rewarding the efforts of a claimant in Wyoming or elsewhere who perhaps sunk his well at trifling expense to a depth of but

fifty feet, while requiring, as in the cases here in question, that the claimant must drill under difficult conditions and at enormous expense for about three-fifths of a mile before accomplishing the desired result.

The inequality in the treatment of citizens that would result if his order were so framed that it would leave one group of citizens in possession while it confiscated the outlay and labor of another whose equities were perhaps even stronger, is too obvious to have escaped the President's attention. The injustice of such inequality of treatment was so apparent that the bald excuse that the development in and prospective fruitfulness of the section which the Government had concluded to seize had especial attractions for the Governmental eye, would only have served to emphasize the ruthless denial to mining claimants of that equal protection which the mining laws, notwithstanding the arbitrary powers of the Government, were supposed to extend to all citizens alike.

These considerations lead properly to the conclusion that the President had the actual intent to extend the protection of his withdrawal order to claimants in possession who had shown due diligence in the work of discovery. It is not conceivable, we submit, that any man who ever has occupied the Presidential chair would wilfully and intentionally have been guilty of a wanton and ruthless use of his constitutional authority.

Turning to the order itself it is, as we have seen, in view of the accepted usage of the language employed, entirely proper if not necessary that the Act be construed to include unperfected claims if the same were at the time in actual possession and were being diligently worked.

But we now desire to emphasize the fact that not only is the interpretation here contended for a possible one, but that it is essential, to give the words an effective meaning—that is a meaning which would not have been already present in the order had they not been used at all.

A claim once perfected by discovery confers vested rights which no one,—much less a man of President Taft's legal learning and ability,—would for a moment suppose could be taken away either by an act of Congress or by a Presidential order.

Sullivan v. Iron Silver Mining Co., 143 U. S., 434;

Manuel v. Wolf, 152 U. S., 505.

If confined to such claims, therefore, the saving clause in the order of September 27, 1909, would serve no useful purpose whatever.

Giving to it the meaning which we contend for, the President's order preserves the rights of a class of claimants whose legal rights against private individuals were thoroughly well established and whose

moral claims upon the Government were of a most compelling character.

This interpretation of the order has already received judicial sanction in the only case in which thus far any court has been called upon to consider the matter.

In *U. S. v. McCutcheon, et al.* (Equity suit A-12, Southern District of California), Judge Bledsoe rendered a carefully considered opinion wherein he gave to President Taft's phraseology an interpretation squarely in accord with our contention. Judge Bledsoe said:

"Special pains were taken to indicate that the intention of the executive was that only '*valid*' locations or claims were to be excepted from the general operation of the withdrawal order. In order to ascertain the extent of this exception it is necessary to define what, under the law, and within the meaning and true intent of the Presidential action, constitutes a '*valid*' location or claim."

After reviewing the authorities and pointing out that prior to discovery the locator has no vested right as against the Government, the learned Judge says:

"Having, however, initiated his claim, by the posting of his notices, he is protected as against third persons, as long as he 'remains in possession and with due diligence prosecutes his claim toward a discovery.' As long as he thus conducts himself, though as against the government he has no vested rights, nevertheless, he has rights which ought to be by all parties respected.

"And, in this spirit, all locators who were thus conducting themselves at the time of the making of the withdrawal order, had their rights respected by the President by the exception contained therein, and hereinabove referred to.

That is to say, on the date that the withdrawal order was made, if any locator was then on withdrawn lands, in

possession, and was 'with due diligence' prosecuting his work toward a 'discovery of oil,' by the express provisions of the withdrawal order, it did not affect him. He had a 'valid' location, and he could, despite the general terms of the order, 'proceed to entry in the usual manner,' that is, proceed to a discovery and thereby perfect his right to the mineral claim. If, however, at the date of the withdrawal order such locator was not in possession, or was not with 'due diligence' prosecuting his work toward a discovery, then he had no 'valid' location, and in virtue of the efficacy of the withdrawal order as an act of a duly authorized agent of the United States government in that behalf, the order served to withdraw from further entry, location, settlement, or other disposal, the lands so claimed by such locator. . . . If discoveries of oil were made subsequent to the withdrawal order in virtue of claims initiated, however, prior thereto, and if at the time of the making of such order the locators or their successors were in occupation of the property claimed, and were at that time diligently engaged in the prosecution of the work looking to a discovery of oil therein they would be protected in their rights by the express terms of the withdrawal order itself."

U. S. v. McCutcheon, et al., Equity Suit A-12.

(The foregoing excerpts from the opinion of Judge Bledsoe will be found set forth in his opinion, which is printed substantially in full as an appendix to the brief filed by the Government in this Court in Appeal No. 2660, entitled "*El Dora Oil Company, et al. v. United States of America.*")

We respectfully submit, for all of the foregoing considerations, that the order of September 27, 1909, preserves to the claimant who is able to make a proper showing of diligence at the date of the order, the right to go on and complete his unperfected location.

We are therefore brought to inquire what the showing of diligence must be to render the particular claims here involved "existing and valid" claims.

THE SHOWING OF DILIGENCE REQUISITE UNDER THE
GENERAL RULE TO RENDER A CLAIM "EXISTING
AND VALID."

The authorities already cited by us have established the proposition that to be "existing and valid," within the meaning of the President's words, a claim must have been such a one on September 27, 1909, as the courts would on said day have recognized and protected against a hostile intruder. The sole test, therefore, by which a claim will be brought within the Presidential words of exception is obviously this:

Was the claimant in possession at the date of the Taft withdrawal order? and was he exercising due diligence in the performance of work leading to a discovery?

Miller v. Chrisman, 140 Cal., 440, and cases cited *supra*.

The general rule as to what will constitute due diligence is thus stated in the leading case upon the subject:

"Diligence is defined to be the 'steady application to business of any kind, constant effort to accomplish any undertaking.' The law does not require any unusual or extraordinary efforts, but only that which is usual, ordinary and reasonable. The diligence required in cases of this kind is that constancy or steadiness of purpose or labor which is usual with men engaged in like enterprises, and who desire a speedy accomplishment of their designs,—such assiduity in the prosecution of the enterprise as will manifest to the world a *bona fide* intention to complete it within a reasonable time. It is the doing of an act, or series of acts, with all practical expedition, with no delay, except such as may be incident to the work itself. The

law, then, required the grantors of the defendants to prosecute the work necessary to an execution of the design with all practical expedition.

“ . . . If it were admitted, however, that his illness constituted a valid excuse for a want of diligence, it would only excuse it whilst such illness continued, which was only for a short time in the early part of 1860. But we are inclined to believe that his illness is not a circumstance which can be taken into consideration at all. Like the pecuniary condition of a person, it is not one of those matters not incident to the enterprise, but rather to the person. The only matters in cases of this kind which can be taken into consideration are such as would affect any person who might be engaged in the same undertaking, such as the state of the weather, the difficulty of obtaining laborers, or something of that character.”

Ophir Silver Mining Co. v. Carpenter, 4 Nev.,
534.

This case has been cited with approval both by Judge Bledsoe and Judge Bean in oil cases heretofore decided by them.

U. S. v. McCutcheon, *supra*.

U. S. v. Midway Northern Oil Co., 232 Fed.,
619.

See, also, for further expressions declaratory of the general rule:

State v. Superior Court (Wash.), 126 Pac.,
945, 953.

There are a number of cases in the books which indicate with clarity some specific acts which will and some which will not sufficiently evidence the diligence requisite in the case of oil lands:

Possession accompanied by active *preparation* to drill a well, although the derrick is not yet completed, is held sufficient.

Weed v. Snook, 144 Cal., 439.

So, too, although no work whatever has as yet actually been done upon the ground prior to the withdrawal order, it will be sufficient if the claimant and his lessee are in possession on that date and the lessee has undertaken to drill for oil and has ordered some materials, even if such materials do not arrive upon the ground until after the Presidential withdrawal order is made.

U. S. v. Ohio Oil Co., No. 852, U. S. District Court, Wyoming, decision by Judge Riner.

Mere possession unaccompanied by any discovery work whatever is, of course, not sufficient.

Borgwardt v. McKittrick Oil Co., 164 Cal., 651, 660.

So-called assessment work—work of the value of \$100 per annum—upon the unperfected claim unaccompanied by continuous possession, is not sufficient.

Borgwardt v. McKittrick Oil Co., 164 Cal., 661;

McLemore v. Express Oil Co., 158 Cal., 559.

Nor is mere possession sufficient where the work is shut down solely for lack of funds, notwithstanding

the fact that the claimant has at one time been engaged in drilling a well and has made large expenditures. (At least such will be the case if it appears that the said well has never resulted in discovery and such expenditures have not contributed to an actual discovery later on.)

U. S. v. McCutcheon, Southern District of California, Equity No. A-12, opinion by Judge Bledsoe on motion for Receiver. (This opinion will be found printed as an appendix to the brief of the Government filed in this Court in the El Dora case, Appeal No. 2660.)

In the recent case of *U. S. v. Midway Northern Oil Co.* 232 Fed., 619, the facts are recited in the opinion as follows:

"No discovery of oil had been made upon any of the lands at the date of the first withdrawal order, nor was any one in possession thereof at that time actually engaged in work looking to a discovery."

It further appeared that no work had been done upon any of the numerous claims there in question at any time prior to the withdrawal order,

". . . except some so-called assessment work which consisted in excavating sump holes, building small cabins, and the erection of a couple of derricks on one of the tracts, which derricks were never used or equipped for drilling, but were subsequently taken down and removed to other parts of the premises" (p. 623).

"Now, the evidence shows, and it is undisputed, that the defendants in none of the cases were engaged in the

prosecution of work leading to a discovery of oil or gas at the date of the first withdrawal order, or in fact doing any work at all. Indeed, no work had been done on any of the tracts for months prior to the order, and then only so-called assessment work" (p. 625).

It was held that the foregoing facts did not bring the case within the protection of the clause of the Pickett Bill which requires that on the date of the withdrawal the claimant shall be "in diligent prosecution of work leading to discovery of oil or gas." The Court further said:

"The mere effort, however diligent, to obtain water for drilling purposes, or the inability to do so, which is all the evidence for the defendants tends to show, cannot be held to constitute a diligent prosecution of work looking to discovery" (p. 626).

We desire to say at this point that we are not here disputing the proposition that a paper location supplemented by a "*mere effort*" to obtain water, unaccompanied by any physical labor or construction to that end, and without actual possession of the claim, will constitute due diligence. We have fully discussed this aspect of Judge Bean's decision in Appellants' Brief in Appeal No. 2789, which is to be considered by the Court contemporaneously herewith, and we respectfully refer in this connection to pages 52 to 59 inclusive of said Brief.

The foregoing rulings of the various courts as to what acts will and will not constitute proper diligence under the general law and under the Pickett Bill, are the only cases thus far decided or reported, so

far as we are advised, which tend to throw light upon the application of the general doctrine of due diligence to cases involving oil claims.

THE FACTS SHOWING THAT THE CLAIMANTS WERE
EXERCISING DUE DILIGENCE ON SEPTEMBER 27, 1909.

To properly measure the acts which we claim establish a proper diligence upon the part of these claimants and their predecessor, it is necessary for the Court to bear in mind the fact that the lands in controversy are situate in an arid country; that the available water supply was very limited; that many diligent claimants anxious to proceed with work could obtain no water at all; that the two companies which had water for sale in the district could furnish but a very limited supply and had long prior to September 27, 1909, already arranged to sell water far in excess of their possible supplies (Tr., pp. 85-86, 125-128, 106-111, 116, 120).

On September 27, 1909, appellant McLeod and his lessees were in actual, exclusive possession of the whole of the section of land which embraces the two quarter sections involved in these appeals. McLeod claimed the section under four location notices. He had by *mesne* conveyances, succeeded to the rights of the locators (Tr., p. 76).

On June 25, 1909, three months before the Taft withdrawal order was made, a lease had been entered into under which the lessee on said date went into

possession. This lease, which is the same the appellant corporation is here claiming under, called for the immediate improvement of the four claims. It contemplated their development as a unit or group. The lease requires that on or before the 15th day of July, 1909, the lessee would erect a derrick suitable for drilling an oil well upon each of the four quarter sections and would within said period erect all bunk-houses necessary for the proposed drilling operations. It requires the lessee on or before August 12, 1909, to install a complete standard drilling outfit, including rig and tools, at one of the four derricks so to be erected, and that the work of drilling for oil should at once begin and be prosecuted diligently to discovery, and that drilling was to proceed upon the others as soon as the first well was completed (Tr., p. 97).

For an understanding of the activities which followed the execution of said lease we respectfully request the Court's particular attention to the affidavits of Alfred G. Wilkes and Charles H. Sherman, which cover pages 82 to 114 of the Transcript of Record in Appeal No. 2787.

Mr. Wilkes was a director of the Mays Oil Company and his testimony covers with particularity the period between June 25, 1909, the date of the lease, and the 27th day of September, 1909, when the withdrawal order was made. He also tells what was done thereafter and up to the coming of Mr. Sherman. Mr.

Sherman, who became the superintendent of the properties in October, 1909, takes up the thread where Mr. Wilkes stops, and discloses the activities of the lessee thenceforward until ten producing wells were developed on the property. The two affidavits give a very complete picture of the plans, the difficulties, the expenditures, and the actual operations of the company. The other affidavits in the Record corroborate these statements, and deal particularly with the water situation. The Government's affidavits are in entire accord with this showing and corroborate it in various particulars.

In syllabus, the essential facts disclosed by the affidavits are these:

Mays Oil Company, after securing the lease of June 25, 1909, entered at once into possession. During the period of three months and two days which intervened between such entry and the 27th day of September, 1909, when the Taft withdrawal order was made it had done work as follows:

It had built a pipe-line extending some three or four miles to connect with the main of the Stratton Water Company. It had constructed a standard derrick on each claim. In addition it had built on the northeast quarter of the section a cook-house, containing a dining-room capable of seating forty men, a kitchen and a bed-room; also a bunk-house and a water tank with pipe-line connections. On the northwest quarter it had built another bunk-house 20 by 30 feet in size.

It had established a stabling yard for its freight teams and horses and buggy on the southeast quarter, and it had built its boiler-house and other machinery for operating one full string of tools for drilling at the derrick on the southwest quarter. It had begun actual drilling on its first well during August, 1909, and by September 27, 1909, it was down about 830 feet (Tr., p. 89). And it was actually drilling with that one derrick on the said date of withdrawal.

The affidavits suggest this very important consideration, viz: This work was all done pursuant to an actual plan to drill and develop the leased properties as a unit from a single camp. To that end the derricks were grouped together about the center of the section, and the pipe-line was laid from these derricks to the only available source of water supply. The camp itself was built in such manner that each of the four quarter sections was always in actual occupation and use and in some way contributed toward the work of drilling at whichever derrick was in use.

The two-inch pipe-line was large enough to convey enough water for drilling at all four derricks, had the water been obtainable. But it was not obtainable. The water company was barely able at the outset to furnish the lessee with enough water for one string of tools. This was the case on and prior to September 27, 1909. But the water company was installing new machinery and was promising to increase the supply, and was making diligent efforts to that end. The

lessee believed these representations and expected speedily to get enough water to operate at the proposed wells simultaneously. It was then believed that thirty days might bring in a well, and in this connection it is to be noted as bearing upon the necessity for and inducement to extreme diligence on the part of the lessee, that the lessee was obligated by its lease to at least start work on the three remaining wells within thirty days after discovery of oil in the first. Apart from this obligation the lessee was very anxious, and willing and had at all times the financial ability to proceed with all of its four wells contemporaneously.

The nearest point from which it could have piped water, assuming that it could have purchased a right to the same, was forty miles away, and the cost of a pipe-line and necessary machinery was prohibitive. It was not practicable to haul the water in wagons. It was the lessee's intent, if it could get no more water, to go from derrick to derrick on said property with the supply it had, and to drill just as rapidly as the available supply would permit. The lessee, as already stated, expected on September 27, 1909, that it would be able to finish each such well in from thirty to ninety days, and even if it did not get more water, the delay was not expected in any event to be a very long one. It would certainly have taken longer than the period of time thus estimated, to pipe in the water from a great distance.

(This was the situation as it appeared to the would-be diligent occupant on September 27, 1909.)

The company urged its crew to the utmost diligence. It in fact offered to its driller a large bonus in stock prior to September 27, 1909, for diligent effort, and subsequently paid it to him (Tr., pp. 92-3).

By September 27, 1909,—a period of three months and two days—the company had expended about \$20,000.00 in its work upon the four claims.

The question for the Court is this:

Do the foregoing facts evidence sufficient diligence on all four of these claims to have entitled the occupant and claimant thereof to protection against intrusion, had the intruder made his hostile entry on September 27, 1909?

Or is it the law that upon the said facts the claimant who was admittedly in actual possession of all four of the claims on September 27, 1909, would have been entitled to hold against such intruder, only the one claim upon which the actual drilling was in progress when the President made his order?

The law of due diligence has never, we submit, been so narrowly and harshly applied in any case to any analogous state of facts, that a court should feel the slightest impulse or compulsion to answer the last question in the affirmative.

There are several answers to these questions which make it very clear that the showing of diligence is sufficient for each of the four claims.

The First Answer: We are concerned only with

the situation on the 27th day of September, 1909. Giving no weight to the plan for developing the property as a unit, and treating each of the two claims in controversy as a separate claim on that day, we find that the occupant had erected a derrick, established an elaborate camp, and laid a water pipe-line for several miles to connect with the mains of a water company. He also had built a water tank, and was earnestly urging the water company to furnish water through this pipe line, without which he could not begin to drill. The occupant had the financial ability to go ahead, and was anxious to proceed. The necessary machinery and tools could be installed in a few days if water was secured. These facilities and structures had been completed but a short time before September 27, 1909, and the delay in getting the water had at that date lasted over a period of only a few days and all the while the water company was promising to furnish the water and was in fact endeavoring to increase its supply to that end. The efforts of the occupant to get water had been persistent, and if there was any delay in starting up, it was purely incident to the work and was on September 27, 1909, as excusable in the law of diligence as if it had been occasioned by a temporary difficulty extending over a few days in getting labor, or fuel, or a delivery of freight supplies.

Ophir Silver Mining Co. v. Carpenter, 4 Nev.,
535, 546-7.

The Second Answer: Drilling was actually proceeding on the adjoining claim; the water for running one string of tools was there available and at worst the water could be utilized as soon as one or two, or at most three wells, were completed, and it was then estimated that the drilling of each well would take no more than from thirty to ninety days, and about a month of this time had gone by already.

As to each of these claims, the wells on the other claims were but obstacles, as it were, which had to be overcome before getting water. It was the same as if a tunnel instead of a well must be completed—a horizontal instead of a vertical bore—before getting water into the pipe line. The claimants themselves were constructing this bore diligently, and the water supply would be ready in from one to eight months at the most.

If the obstacle were a tunnel the showing of diligence would be ample; for the following instructions were held to correctly express the law on this point in a California case:

“6. That in determining the question of plaintiffs’ diligence in the construction of their ditch, the jury have a right to take into consideration the circumstances surrounding them at the date of their alleged appropriation, such as the nature and climate of the country traversed by said ditch, together with all the difficulties of procuring labor and materials necessary in such cases.

“7. The law does not require a vain or useless thing to be done; that therefore the plaintiffs were not required by the law of due diligence, to complete their

ditch before they could successfully use it for the purpose for which they dug it.

"8. If the tunnel through the ridge was a necessary part of the plaintiffs' ditch, without which it could not be used, then it was only necessary for the said plaintiffs to complete their said ditch by the time they could, with reasonable diligence, succeed in preparing their tunnel for use."

Kimball v. Gearhart, 12 Cal., 27, 30.

A Third Answer: The work of drilling a well then being diligently prosecuted by the same occupant a few feet away on the adjoining claim, was of a character which would tend to bring about a discovery of oil on the claim in question.

While waiting for water on September 27, 1909, the lessee, in addition to its other activities and improvements, had employed and put to work a geologist to carefully study the formation in order to guide the actual work of drilling on the property in controversy, this would certainly have been treated by a court as a proper item of work in the makeup of the occupant's showing of diligence. Now it cannot be said that the work of drilling on the adjoining claim would not give an actual knowledge of the formation far more satisfactory than any expert opinion would be. In this connection it should be borne in mind that the Government itself in the "Five Claims Act" has recognized that work on one of five oil claims "may tend to determine the oil bearing character" of the four adjoining claims.

And the Supreme Court of California has said:

“Deeper drilling might discover additional strata of oil bearing sand, for example, and such discovery on one claim might satisfactorily establish their existence under all of them. If so, it would tend to determine the oil bearing character of the contiguous claims.”

Smith v. Union Oil Co., 166 Cal., 217, 224.

Moreover, work outside of a particular claim has always been held sufficient as assessment work if it has a legitimate tendency to aid in the development of the claim.

“It has been so often decided that labor and improvements within the meaning of the statute are deemed to have been had on a mining claim when the labor is performed or the improvements are made for its development—that is: to facilitate the extraction of the mineral the claim may contain, though in fact such labor and improvements be at a distance from the claim—that the citation of authorities seems unnecessary. Thus it has been held that the building of roads and the like for the purpose of aiding in the development of mining property, although not within the limits of the claim itself, was a sufficient compliance with the statute requiring assessment work to be done.”

United States v. Ohio Oil Company, et al.
(Suit No. 852, District of Wyoming).

Ours is not the case of a third person engaged in developing adjoining property. We ourselves were proceeding with a fixed plan to develop not only the adjoining property but these particular claims as well, and had our plant in substantial readiness to complete our purpose. We were, on September 27, 1909, doing work on the adjoining claim which would

demonstrate the oil-bearing character of the claims here in controversy, and guide and assist us in making our discovery when once the drilling should start up. This fact in connection with the rules laid down in the foregoing authorities, fully meets any technical objection that discovery work was not in actual progress on the date of the withdrawal "on" the claims in controversy. In short, it establishes the fact that although compelled to wait what then appeared to the lessee to be a comparatively short time before getting water and starting the wells on these two claims, said lessee was nevertheless accomplishing meanwhile and on the crucial date work which would facilitate a discovery of oil on the claims in controversy, and which was, therefore, in law discovery work.

Under the general circumstances here appearing the rule, as already pointed out, is as follows:

"The law does not require any unusual or extraordinary efforts, but only that which is usual, ordinary and reasonable. The diligence required in cases of this kind is that constancy or steadiness of purpose or labor which is usual with men engaged in like enterprises, and who desire a speedy accomplishment of their designs. Such assiduity in the prosecution of the enterprise as will manifest to the world a bona fide intention to complete it within a reasonable time. It is the doing of an act, or series of acts, with all practical expedition, with no delay, except such as may be incident to the work itself."

Ophir Silver Mining Co. v. Carpenter, 4 Nev., 534, 546-7.

To this may be added the following expression in

Kimball v. Gearhart, 12 Cal., 27, 30, to the effect that circumstances:

“ . . . such as the nature and climate of the country . . . together with all difficulties of procuring labor and materials necessary in such cases,”

may be taken into consideration.

Water is as much a “material” as is fuel, or machinery.

THE QUESTION OF FACT AS TO DUE DILIGENCE IS PRIMARILY FOR THE LAND DEPARTMENT—NOT FOR THE COURTS—AND THAT DEPARTMENT HAS PASSED UPON IT.

Upon the assumption that our interpretation of the Taft order is correct, it follows that it falls within the jurisdiction of the Land Department of the Government upon applications for patents for lands within the withdrawn area to examine into the question of due diligence in order to determine whether the particular claims were “existing and valid” at the date of the withdrawal order. The question of diligence is a question of fact which the land office has jurisdiction to pass upon.

Riverside Oil Co. v. Hitchcock, 190 U. S., 316;
Cosmos v. Gray Eagle Oil Co., 190 U. S., 308;
United States v. Schurz, 102 U. S., 396.

The record shows that appellant McLeod in 1914 duly applied for a patent covering the whole of the lands in controversy, and after due proceedings had

to that end, there was issued to him a Final Certificate of Entry (Tr., pp. 80-2).

There is no mention of this fact in the complaint. There is not in the case the slightest pretense that any fraud was practiced in placing before the Register and Receiver the evidence upon which he determined that appellant McLeod and his lessees were sufficiently diligent to have taken the land away from the operation of the Taft order or to have brought it under the protection of the Pickett Bill.

In the absence of a direct attack showing fraud in proofs of diligence, the determination of the Land Department upon this question of fact of diligence precludes any court from now inquiring into that question. That our final receipt cannot be attacked in any such manner is settled law:

“In the present case the Brick Company’s application for a patent was filed, each of the several forms of notice required by statute was given, no adverse claim was filed, the purchase price was paid to the Government, and a final receipt was issued by the local land office. The entry by the local land officer issuing the final receipt was in the nature of a judgment *in rem* (*Wight v. Dubois*, 21 Fed. Rep., 693), and determined that the Brick Company’s original locations were valid and that everything necessary to keep them in force, including the annual assessment work, had been done. It also adjudicated that no adverse claim existed and that the Brick Company was entitled to a patent.

“From that date, and until the entry was lawfully cancelled, the Brick Company was in possession under an equitable title, and to be treated as ‘though the patent had been delivered to’ it. *Dahl v. Raunheim*, 132 U. S., 262. And, when McKnight instituted possessory proceedings against the Brick Company, the latter was entitled to a judgment in its favor when it produced that final receipt

as proof that it was entitled to a patent and to the corresponding right of an owner."

El Paso Brick Co. v. McKnight, 233 U. S., 257.

See also:

Hamilton v. Southern Nev., etc., Co., 33 Fed., 562;

Orchard v. Alexander, 157 U. S., 372;

Cornelius v. Kessel, 128 U. S., 457.

Nor could our Final Receipt, even upon direct attack, be questioned for any mere error of the Register and Receiver in deducing the conclusion from the evidence before him, that we were duly diligent on September 27, 1909. Whether or not an applicant for a patent has been duly diligent at a given date is a pure question of ultimate fact. While it is to be resolved in the light of certain accepted rules of law as to what in general will constitute diligence, it is a question of fact, nevertheless.

The Government has made no direct attack upon the Final Certificate which we presented in our showing. The Government nowhere asserts that any fraud was practiced in the evidence of diligence offered by the applicant during the proceedings in the land office. It makes no mention of the Land Office proceedings at all.

Our Final Certificate should therefore have been treated in the court below, and must be treated here, as conclusive evidence—indeed a conclusive adjudica-

tion by the proper tribunal—that here the diligence was such on September 27, 1909, that appellant McLeod was entitled to proceed to entry and patent.

Upon the evidence furnished by the Final Certificate, therefore, the full equitable title is shown to be in appellants, while the Government at most has a naked legal title. No Receiver, of course, should have been appointed on such a showing.

II.

APPELLANTS' RIGHTS UNDER THE PICKETT BILL.

If our rights are preserved by the Taft withdrawal order, it is not necessary for the Court to look to the Pickett Bill at all. Similarly if the issuance of a Final Certificate of Entry by the Land Department has the force of a judgment *in rem*—as the United States Supreme Court has declared (232 U. S., 257), we have no occasion to rely upon the Pickett Bill.

If on the other hand the issuance of a Final Certificate by the Land Department has not settled the question and our interpretation of the President's order is not followed and this Court shall hold that because our claims were not perfected on September 27, 1909, our pre-existing rights were utterly destroyed and taken away by the Taft withdrawal, then we must turn to the Pickett Bill for our relief.

SCOPE OF THE PICKETT BILL.

Assuming that the Taft withdrawal order destroyed every claim not perfected by discovery on September 27, 1909, the Pickett Bill obviously restores the rights of any claimant in the situation in which we consider ourselves to have been on the 27th day of September, 1909. The proviso of the Pickett Bill reads as follows:

“Provided, that the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a *bona fide* occupant or claimant of oil or gas bearing lands, and who at such date is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work.”

That this Act was at least applicable to claims where the possession and discovery work were such that the courts would have protected the occupant against intruders, the learned Attorney General himself concedes. In his letter to the Secretary of the Interior, dated April 26, 1916, referring to locators upon the oil lands whose claims were not affected by discovery, he says:

“These persons (i. e., locators) under the existing law were entitled to enter upon the public lands, to survey and mark the portions desired, to explore for oil and gas, and upon discovery to take title ultimately by patent. So long as they were diligently and in good faith engaged in prosecuting the work of discovery they were entitled to possession and to protection against clandestine and hostile entry by others. *Miller v. Chrisman* (140 Cal., 440; 197 U. S., 313); *McLemore v. Express Oil Co.* (158 Cal., 559); *Borgwardt v. McKittrick* (164 Cal., 650).

“The proviso to the Pickett Act protected this explorer’s right from the order of withdrawal to the same extent and upon the same conditions as it was protected by pre-existing law against private intruders.”

There is, therefore, upon this point no dispute between the Government and ourselves as to the general proposition that any claim accompanied by possession and what would be considered due diligence under the pre-existing law is restored and revived by the foregoing provision of the Pickett Bill.

It should be noticed that if killed by the withdrawal order, such a claim remained dead for upwards of eight months and until revived and resurrected by the Pickett Bill of June 25, 1910.

We have seen that in the learned Attorney General’s view as above expressed, the same showing of diligence that would have saved our claims under the interpretation placed by us upon the Taft order will be sufficient also to save it under the Pickett Bill. The rule, therefore, by which a showing of sufficient diligence may be determined is, Was the showing of diligence such that the courts would have protected the occupant on September 27, 1909, against a hostile intrusion?

All that we have set forth, therefore, *supra*, on pages 1 to 27 inclusive, is applicable to this proposition, and we respectfully request the Court to consider the same as incorporated hereunder.

If under the circumstances of our case this Court

shall hold that any delay in having started actual drilling upon these claims prior to September 27, 1909, was excused under the general law of due diligence pending our continued efforts to get a sufficient supply of water through our already-constructed pipeline, we have no occasion to go further in our consideration of the relief afforded to us by the Pickett Bill.

So, too, if the Court shall hold that the drilling which we were actually engaged in at the date of the order upon the adjoining claim was discovery work within the fair intendment of the pre-existing law of due diligence, there is no occasion to look further into the meaning of the Pickett Bill.

But if this Court does not accept our views on the preceding proposition, then it becomes important that we point out that a much more liberal rule as to the diligence requisite was incorporated into the phraseology of Congress than is to be found in the general law if it is thus interpreted by the Court.

LIBERAL CONSTRUCTION OF "WORK LEADING TO DISCOVERY."

That this remedial statute was intended to and does greatly enlarge the class of claims which were unaffected by the withdrawal order cannot be doubted. That order as interpreted by us exacted both actual possession and diligent discovery work. The act of Congress, on the other hand, does not require that

the claimant should have been in physical possession. We do not understand that the learned Attorney General disputes this proposition.

But the principal point which interests us is this: If it be that under pre-existing law our actual drilling work on one quarter section cannot be treated as evidence of diligence to make a discovery on the other three adjoining claims, then the Act at once comes to our rescue; for the phrase "in diligent prosecution of work leading to discovery of oil or gas" is a phrase which was intended by Congress to embrace actual drilling upon one claim in what may be termed a unit or group development.

The history of the Pickett Bill is to be found in official governmental publications (See "Hearings held before the Committee on the Public Lands, of the House of Representatives," May 13th and 17th, 1910, H. R. 24070).

As originally framed the bill ratified the Taft withdrawal order of September 27, 1909, in express terms. A delegation of oil men, all of whose claims had been initiated prior to the Taft withdrawal order (above pamphlet, page 17) went before the House and Senate Committees on Public Lands, in May, 1910, and stated their grievances. The result was that the bill as finally recast contained the proviso above quoted. It is not open to doubt that it was designed for the express purpose of protecting a certain class of unperfected locations which, it was believed or feared—

whether rightly or wrongly is not important—the Taft withdrawal order did not protect at all.

Judge Bledsoe's decision, in the Obispo Oil case above quoted, had not then been rendered, and by many oil men it was feared that all oil lands not covered by perfected claims had been withdrawn by the order, no matter how much actual work had been done thereon, if no discovery had been made at the date of the withdrawal.

But that was not all. Even, as since interpreted by Judge Bledsoe in the Obispo Oil case, the exception contained in the Taft order required actual *pedis possessio* of the claim, accompanied by "due diligence" toward its actual development. Even as so interpreted, the exception did not meet the situation in which a great many oil men found themselves, for many companies had bought or leased groups of claims—wholly unprotected by actual discovery,—with the intention of developing them as a single group or property. There were many cases in which vast outlays had been made on such a group, all tending to determine the oil-bearing character of a new field, and yet there was no actual *pedis possessio* of or improvements upon one or more unperfected locations in the group. In some instances—but by no means in all—the preliminary steps had reached the point where one or more wells were actually being drilled on some one of the group of unperfected locations. The other unperfected claims in the group might adjoin the

claim on which the drilling was going on, or they might be a mile or more away, and yet the one well, should it strike oil, would determine—or at least tend strongly to determine—the oil-bearing character of the whole group of claims. In any event, such a well would afford a knowledge of the formation and aid as a guide in future development work upon the several as yet untouched claims, and also perhaps furnish a supply of fuel or additional water for future contemporaneous drilling.

In the remote, fenceless, desert districts which comprise the oil fields, there would, in many cases, be no actual physical possession of any part of the company's surrounding on adjoining claims, save at the one well where drilling operations were under way. And again, perhaps there would be no drilling at all actually under way anywhere in the group, as in cases where there were large preliminary outlays for roads, pipe lines, and undelivered lumber and machinery.

It has always been a recognized fact that work on one oil well may tend to determine the oil-bearing character of the surrounding locations. Congress, we have seen, itself recognized this fact in the Five Claims Act, 32 Statutes, 825. And, as already pointed out, the Supreme Court of California has taken judicial notice of the fact that deep drilling on one of a group of claims, "would tend to determine the oil-bearing character of the contiguous claims, although wholly

unnecessary to perfect the locations" (*Smith v. Union Oil Co.*, 166 Cal., 217, 224).

With these considerations in mind it is our purpose to point out that Congress intended that if a well or other development work intended as a part of a group development, was actually in progress in good faith upon one of the group on September 27, 1909, this sufficiently fulfills for the whole group the "diligent prosecution of work" called for by the Act.

The following excerpts from the proceedings before the House Committee on Public Lands during the consideration of said bill make the situation which Congress sought to remedy very clear:

"MR. O'DONNELL—This El Cerito well is a fair illustration of the 'wildcatting' in this territory. It was drilled to a depth of over 4,000 feet and was unsuccessful. Is there anybody here that knows the exact amount expended on that well?

"A GENTLEMAN—\$110,000.

"MR. O'DONNELL—I will say, anyhow, that it was over \$100,000.

"THE CHAIRMAN—Has a discovery been made on that particular tract up to this time?

"MR. O'DONNELL—No; there has not. They have been working there for nearly four years, I believe.

"THE CHAIRMAN—And therefore the people who have expended \$110,000 at that point have not clinched their claim legally by making a discovery?

"MR. O'DONNELL—If you go to the Land Office to-day, they will report that it is vacant.

"THE CHAIRMAN—Oh, yes, certainly; they will do that as to all of them. . . .

"MR. VOLSTEAD—But, as a matter of fact, they have not yet made a discovery?

"MR. O'DONNELL—They have not yet made a discovery.

"MR. VOLSTEAD—Do you mean to say that no discovery has been made in that field at all?

"MR. O'DONNELL—No; not yet. The development through there is very expensive. It may not be oil territory. These people may be wasting their two or three millions of dollars that will have been expended there anyhow. But they are doing it; and in case of the withdrawal, if it should be oil land, it would not be theirs after they got it.

"THE CHAIRMAN—But the importance of that is this: Here is one tract of 160 acres upon which \$110,000 has been expended, where no legal right has been acquired, assuming that a legal right is only acquired when a discovery of oil is made.

"MR. O'DONNELL—Yes; that is right.

"THE CHAIRMAN—And therefore, in case of a withdrawal, that did not recognize the claim of those who had made that expenditure, they might lose all of their expenditure in that particular tract, and all claim to it?

"MR. O'DONNELL—That is the idea.

"MR. LACEY—They are still going on. Notwithstanding the withdrawal, they are still going ahead.

"MR. O'DONNELL—They are abandoning that well now, and moving to another location higher in the formation. They got their information there, though, at this cost; and that is the way the development proceeds. It is not all successful.

"THE CHAIRMAN—Now, they have gone on to another claim?

"MR. O'DONNELL—Yes; that is my understanding.

"THE CHAIRMAN—That claim was located prior to the withdrawal?

"MR. O'DONNELL—Yes.

"THE CHAIRMAN—But of course no discovery was made on it prior to the withdrawal?

"MR. O'DONNELL—No.

"THE CHAIRMAN—And they now seek to obtain some benefit from their \$110,000 expenditure at a point where it was valueless by going upon another claim, located prior to the withdrawal, and making a discovery there?

"MR. O'DONNELL—That is the idea exactly. . . ."

*Hearings, Public Lands Committee, May 13
and 17, 1910, on H. R. 24070, p. 3.*

Mr. Orcutt was another operator.

"THE CHAIRMAN—You are drilling upon a *tract* that was filed upon before withdrawal?

"MR. ORCUTT—Yes, sir.

"THE CHAIRMAN—Upon which discovery had not been made prior to the withdrawal?

"MR. O'DONNELL—It is not made yet.

"MR. ORCUTT—It is not made yet. We have spent thousands and thousands of dollars there trying to make a discovery.

"THE CHAIRMAN—Were you on *that particular tract*, drilling, at the time of the withdrawal?

"MR. ORCUTT—*We were on some of it.* We had the tools on some of it at the time of the withdrawal.

"THE CHAIRMAN—*But you had it all located* with a view to future development?

"MR. ORCUTT—We had *it all* located prior to the withdrawal."

ibid, pp. 21, 22.

Many other similar passages to those above set forth might be quoted. The foregoing, however, sufficiently illustrate the point that one of the objects and purposes of the proviso was to meet the situation thereby declared and to protect these groups of claims in proper cases; and to that end to provide that active development work—such as drilling that \$110,000 well—progressing in good faith at the date of the withdrawal at one of a group of claims and having a tendency to effect or facilitate the discovery of oil on the rest of the group, should be deemed sufficient to preserve the rights of the claimant to the entire tract.

The precise language of the proviso is itself convincing. The Act protects the "claimant of oil or

“gas-bearing lands . . . who at such date is in “diligent prosecution of work leading to discovery “of oil or gas.” It makes no reference whatever to a “location.” The phraseology includes a tract of land made up of a group of claims—“oil-bearing lands”; that is all. And the “work leading to discovery” nowhere bears reference to any location, but is referable to the whole tract of oil-bearing lands so claimed. It does not say that the work of discovery must be upon or referable to a single location. He must be a *bona fide* claimant, and this cannot be unless he manifests by his acts and conduct that he has a *bona fide* intent to discover oil upon the tract which he claims. Any work in diligent progress having a fair tendency to that end will satisfy the Act, and such work may be either on or off the tract.

One successful well, as we have seen, would be a practical demonstration that further wells would be justifiable within the tract. It would determine the formation and lead to discoveries elsewhere on the group. So, too, such well might supply water or fuel for further drilling in the tract. In this way discovery on all of the claims in the group claimed would be facilitated. The sinking of the one well, in other words, is “work leading to discovery of oil or gas” on every claim within the group.

No one can read from end to end the proceedings from which we have quoted and not be convinced that

Congress intended work of that character to be sufficient.

The Land Department in a very important and carefully considered case has adopted the general view of the meaning of the Pickett Bill which we are here pressing upon the Court. The learned Commissioner of the General Land Office (Mr. Tallman) had before him the following facts among others:

The Honolulu Consolidated Oil Company asked patents for a group of seventeen claims—each covering a quarter section—all of which were not contiguous, but none of which was more than three miles from a certain Section 10—patented land upon which the company contemplated its central station should be located for the development of the field.

Upon thirteen of these quarter sections, cabins had been erected in January or February of 1909.

On four of them no cabins had been erected.

On four of the claims on which cabins had been erected, skeleton derricks had been constructed prior to March 1, 1909.

On seven of them skeleton derricks had been erected prior to August 1, 1909.

On six of them no derricks at all had been erected prior to the Taft withdrawal of September 27, 1909.

On the four claims upon which no cabins were built, skeleton derricks were erected as early as February, 1909, but *these derricks appear to have been*

the only improvements of any kind upon the said four claims at any time prior to the year 1910.

Actual drilling did not begin on any one of the whole seventeen claims prior to February 14, 1910. Drilling upon one of them did not begin until March 3, 1911.

Groups of camp buildings were established on some of the sections of land before the date of the Taft withdrawal order. On others there were none.

Buena Vista Lake, from which water was obtained, was only 13,000 feet (about two and one-half miles) distant from said Section 10. Two pipe lines, each two inches in diameter,—both of which proved utterly inadequate on account of the friction in pumping to the elevation,—had been constructed from the lake as far as said Section 10 by May 3, 1909.

It did not appear that any distributing pipe lines connecting with the central reservoir on Section 10 were constructed prior to the Taft withdrawal order.

The roads constructed for this development work had all been completed prior to September 1, 1909.

The cabins on thirteen of the claims appear to have been occupied. There appears to have been no *pedis possessio* whatever on four claims at the time of the Taft withdrawal order, and no improvements, beyond the fact that of the four claims there was the skeleton derrick above referred to, together with a road leading therefrom.

It appears that after drilling first started and be-

tween February 14, 1910, and April 16, 1910, the company, with its then water supply, had been able to start work on but three wells—the first on February 14th; the second on March 1st, and the third on March 29th—all in 1910. A four-inch main between Section 10 and the lake and a pumping plant was completed by April 16, 1910, and on May 17, 1910, the company began drilling its fourth well. Wells upon the remaining claims were started between June 13, 1910, and March 3, 1911.

There, as here, the evidence clearly indicated the intention of the oil company to develop the entire group of claims.

In the course of his elaborate opinion—wherein he allows the application—Commissioner Tallman says:

“From the foregoing it is observed that actual drilling did not commence on any one of these claims until after withdrawal of the land on September 27, 1909, and that periods of several months elapsed with no work leading to the discovery of oil or gas being done or improvements made within the boundaries of some of them. It is quite clear that each of these applications must fail if considered alone without allowance of credit for any of the general preliminary work and common improvements begun prior to the withdrawal and claimed to have been so designed and prosecuted as to except the claims involved from its force and effect. A considerable part of this general work and many of the improvements used in the scheme of common development were placed on lands not covered by the claims,—lands that had been previously patented. The following questions then arise:

“1. Is preliminary work performed outside the boundaries of a claim (such as building roads and pipe lines, the installation of machinery, etc.) under any circumstances ‘work leading to the discovery of oil or gas’ within the meaning of the proviso to the act of June 25, 1910?

“2. May such work and improvements be in the nature

of a common improvement for the benefit of several claims?

"Just what is admissible as work leading to the discovery of oil or gas within the meaning of this act, is an open question and one on which there has been a wide divergence of opinion. It has been contended, though not in this case, that efforts looking to the financing of a scheme to develop an oil property should be placed in this category, while on the other hand, the other extreme has been advanced that nothing short of actual drilling on the land should be admitted. After a careful consideration of this question, I am of the opinion that, in proper cases, work and development relating to the land itself and the installation of equipment necessary to its physical development looking to oil or gas production, may be classed as work leading to discovery. If when viewed from a practical business standpoint and in accordance with good, approved practice, the preliminary work of building and maintaining good roads, the development of water and fuel system, the installation of machinery and the construction and equipping of camps are necessary to the work of discovery or essential as an economic business proposition, then in my judgment such work and improvements may properly be recognized as work leading to discovery within the meaning and contemplation of the act, *provided*, it is clearly apparent from all the facts that such work and development are designed and intended to develop the particular claim in question.

"Furthermore, I am unable to see any good and sufficient reason why such work and improvements not within the boundaries of a particular claim may not in proper cases and within certain limitations, be equally considered as work leading to discovery where such work and improvements are designed and adapted for a unit development of several claims under a common and connected system. Therefore, I am of the opinion that 'work leading to the discovery of oil or gas,' may consist of labor and improvements actually performed and used in the common development of several mining claims, provided it is clearly shown that there exists a common ownership, that the work is of such a character as to be clearly adapted to and intended for a unit development, that the inclusion of each particular claim composing such unit is clearly apparent from the physical facts on the ground, and that the nature of the common development is consistent, and its extent commensurate, with the character

and area of the group of claims proposed to be developed as a unit.

"These questions having been answered in the affirmative, the third question arises.

"3. What shall be the extent and continuity of operations to constitute diligence within the meaning of the act and the decisions of the Department and the courts generally?

"As a general proposition what constitutes diligence must depend upon the facts in each particular case. Manifestly, in an enterprise beset with many unknown conditions, due regard must be given to those unavoidable delays which arise out of the contingencies of the development work itself, provided due diligence is found to exist in meeting new conditions as they arise, and all the facts of the situation indicate that the element of good faith is at all times apparent.

"If it be satisfactorily shown that the applicant's efforts have been applied in the manner accepted generally as in accordance with good business practice after all the conditions have been considered, one act following another in logical and orderly sequence, as dictated by experience and reasonable judgment, with the object of reaching and discovering the oil or gas measures lying within his claim, or group of claims, I believe he should be credited with due diligence and with having met the requirements of the act in this respect, provided at the date of the withdrawal, and continuously thereafter to discovery on each particular claim, either (a) such common development and improvement leading to discovery as may be properly and directly credited in part to each particular claim, pursuant to the principles above discussed, or (b) development and improvement work leading to discovery on the particular claim itself, are continued diligently and without interruption, on a scale commensurate with the extent of the unit development contemplated and in accordance with good economic practice, the required continuity of such common or particular development and improvement to be ascertained from the work and improvements actually done and made on the ground. It does not follow from the above, however, that a mere progressive development of a series of claims one after another where the claims of the series last developed are not directly and necessarily dependent on the prior development of other claims in the group, would constitute diligence within the meaning of

the act so as to offset the effect of an intervening withdrawal."

See opinion in

Honolulu Consolidated Oil Co. (December 15, 1915; Visalia 03495).

In order that the Court may be fully informed as to the status of the foregoing application, it should be said that on April 12, 1916, the Department of Justice requested the Honorable Secretary of the Interior not to issue patents on the Commissioner's opinion pending the judicial determination of pending suits (of which this is one). While expressing no disagreement whatever with the views of Commissioner Tallman, the Honorable Secretary of the Interior has, in deference to this request, withheld thus far the issuance of such patents.

In this connection the attitude of the learned Attorney General toward the said Honolulu decision is interesting. In his letter to the Secretary of the Interior, wherein he requests that patents be not issued to the Honolulu Consolidated Oil Company pending an interpretation of the Pickett Bill by the courts, he says:

"April 16, 1916.

"Hon. Franklin K. Lane,
Secretary of the Interior.

"Dear Sir: In accordance with previous correspondence between us, I now submit to you a statement of the conclusions reached by this department with regard to the above-mentioned opinion. Some of the principal questions

of law presented are involved in pending litigation and some of them have already been argued and submitted on behalf of the Government. Until the courts have acted it will be seemly and in every way desirable for executive officials to hold their own views in suspense so far as possible. You will understand me, therefore, as not intending to be dogmatic in what follows, but as simply expressing the views which, with the light now available, are at present entertained. These may be summarized as follows:

* * * * * *

"3. All work 'leading to discovery' need not be performed on the identical tract in view and upon which discovery must ultimately be made to permit a location. Indeed, in the search for oil and gas, extraterritorial work, such as road making, pipe laying, etc., is frequently, if not customarily, indispensable. But of course such extraterritorial work, to be availing, must be necessary in character and clearly related to the tract in question. To avoid abuses the character, scope, and necessity of such work should be closely scrutinized. The bona fides of the explorer would, of course, be weighed in the light of the contemporaneous presence or absence of open and notorious acts of possession upon the tract itself.

"4. It may be that under exceptional circumstances two or more contiguous tracts may constitute what, in the commissioner's opinion, is styled a 'unit development,' and as such may share the benefits of preliminary work 'leading to discovery,' which is not performed upon either of them. The difficulty with this doctrine lies in stating and limiting it so that it may be harmonized with the fundamental purposes of the mining law to preserve free and open competition and to prevent claimants from monopolizing more land than they are actually engaged in exploring."

Up to this point, it will be observed that there is no apparent conflict between the views of the Attorney General regarding the Pickett Bill and those which we ourselves have advanced. But the learned Attorney General then goes on in his letter and apparently interprets the opinion of Commissioner Tallman as indicating that if the work performed on an entire

group is ^{of} no more ^{significance} than that ordinarily required of the claimant of a single location, it will nevertheless be enough to hold the entire group; and the learned Attorney General proceeds to express his convictions to the contrary.

We do not think that Commissioner Tallman so held or that he intended to be so understood. At any rate, we ourselves are not called upon by the facts in our case to go so far. We are not here concerned with what our rights might be if there were a showing that the improvements actually upon our group of claims and our water pipe line leading to them bore no relation to the unit development called for by our lease. If they were adequate to the development of only one claim at a time, the question might be very different. But it is enough that such is not the actual fact.

The lease under which our development work was done required the simultaneous drilling of several wells. At least one on each claim in the entire group was to be started within thirty days after the first discovery (Tr., p. 97), and the lease also called for further simultaneous development. The water pipe line was built for the purpose of supplying enough water for simultaneous work on all four of the claims, and its capacity (two-inch) was sufficient for the purpose. The lessee did not merely erect a derrick on one claim and install a single rig—but built a derrick on each claim at a convenient place to work all four of

them simultaneously from the one central camp. The camp itself was not a "one-derrick camp." It was purposely built to accommodate forty men in anticipation of simultaneous drilling on the entire group of claims (Tr., p. 91). So that here we have a clear case where the improvements erected had immediate reference to developing the whole property as a group. It was "necessary in character," was "clearly related to the tract in question" and responds most satisfactorily to the close scrutiny suggested by the learned Attorney General under paragraph 3 of the foregoing letter.

But there are certain further expressions in the said letter of the learned Attorney General to the Secretary of the Interior with which we do not agree and the repetition of which here will serve, we think, to emphasize the difference in point of view which probably lies at the foundation of this litigation.

He says:

"The situation must be looked at, of course, from a point of view entirely different from that which would prevail if the tracts were already under a common, private ownership. In that event, sound business judgment might dictate that preliminary operations should be confined to some one tract, and that expenditures upon the remaining tracts should be deferred to await results. Failure to obtain oil at the place selected for the first drilling might dictate the abandonment of the entire enterprise. Success there might not only demonstrate the value of the remaining lands, but might furnish fuel for subsequent operations. So a single water pipe, of moderate dimensions, extended in succession to one tract after another, might suffice for drilling on the tracts in sequence; whereas a much larger and more expensive pipe line, with branches, or a number of such lines would be required to conduct drilling on all of

the tracts contemporaneously. But however wise such methods would be from an economic standpoint on the part of an absolute owner, I am unable to persuade myself that such foresight and economy can be taken as a substitute for the diligence required under the mining law as to each tract sought to be held. I do not think that under that law a tract may be held tentatively to await exploratory work conducted upon another which does not tend directly to exploration upon the former. A search for fuel or water on one tract, for use if found in exploring another, is not work done in exploration of that other; and this is all the more true if the search is conducted entirely outside of any of the tracts sought to be grouped as a unit."

Some of the foregoing expressions seem to be in sharp conflict with the general rules defining what comes within the purview of proper diligence. For convenience we here again repeat the words of Judge Hawley which are expressive of the universally accepted doctrine:

"The law does not require any unusual or extraordinary efforts, but only that which is usual, ordinary and reasonable. The diligence required in cases of this kind is that constancy or steadiness of purpose or labor which is usual with men engaged in like enterprises, and who desire a speedy accomplishment of their designs. Such assiduity in the prosecution of the enterprise as will manifest to the world a bona fide intention to complete it within a reasonable time. It is the doing of an act, or series of acts, with all *practical* expedition, with no delay, except such as may be incident to the work itself."

Ophir Silver Mining Co. v. Carpenter, 4 Nev.,
535, 536-7.

This, we submit, is a far sounder doctrine than that which certain expressions in the passage quoted above from the letter of the learned Attorney General seems to express.

If "the assiduity in the prosecution of the work" manifests to the world a *bona fide* intention to complete it within a reasonable time, and if the diligence is of a character usual with men engaged in like enterprises upon their patented land who desire a speedy accomplishment of their designs, it satisfies Judge Hawley's appreciation of the law.

What useful purpose, we may well ask, would be served by following out the learned Attorney General's view? If the good faith of the plan for group development sufficiently appears, and the claimant has ample means—and their sufficiency is of course an element in his good faith—why should Congress ever have felt it necessary to exact of him an economic waste of his capital?

Practical business methods certainly would have no tendency to discourage development. In an untried field, such as ours was, no one knew how deep he would have to go. A sensible man would be much more likely to go on with drilling to a depth of three thousand feet and thus demonstrate his group if he were called upon to drill one well, than if he were forced to drill four wells at a time. Is it not more likely that one who had undertaken four wells would get discouraged and abandon all four of them at, say, one thousand feet and thus make no discovery at all? If, therefore, the underlying policy is the encouragement of actual discovery, the latter would certainly be fostered, rather than retarded by the economies which

the owner of a patented tract would be wise in observing.

It is not conceivable, in view of the remedial character of the proviso in question, that Congress ever intended that the Bill should exact from the oil men a higher degree of diligence in their group operations than that which—paraphrasing Judge Hawley's words—was usual with men possessed of sufficient capital and bent upon exploring for oil, a tract of patented land larger than any single mining claim in area, which land they believed to be oil bearing, and where in good faith they had the desire to demonstrate this fact and develop the property speedily. Such a group of men, however wealthy, would not be likely to go to wasteful and absurd extravagances in rushing their work. They would not, for instance, rush to begin the building of a half-million-dollar pipe line in order to get water with which to drill upon three extra claims a few feet away on the same section of land when they believed themselves able to get water elsewhere at a trifling cost within a few months and probably sooner than they could complete such a pipe line.

**JUDGE RINER FORTIFIES COMMISSIONER TALLMAN'S
VIEW OF THE PICKETT BILL.**

The United States District Court of the District of Wyoming has handed down an opinion in one of the suits brought by the Government which is far more liberal on its facts than is the decision of Commissioner

Tallman in the said Honolulu Consolidated oil case.

The lands involved were embraced in a withdrawal order dated May 6, 1914. They had been located early in the same year and consisted of two claims covering a tract of 240 acres. In April, 1914, representatives of the locators and of defendant company together "examined the lands." In the last part of April, 1914, defendant corporation took an oral agreement to lease the claims as a whole (or group) and agreed thereby to proceed with the drilling of wells. The defendant company "at once" employed one Virgil Jackson and "left him in charge of the claims." This, it will be noted, was in the last part of April. On May 4, 1914—two days before the withdrawal order there in question was made—the defendant corporation directed that certain materials owned by it and stored at Caspar be loaded on the cars for shipment to Kirby, the nearest railroad point. On the same day lumber was ordered to be delivered on the lands and "a carpenter was employed to construct certain necessary buildings." On May 5th a contract was entered into with a man to drill wells on the claim in controversy. Pursuant to this oral contract of lease the Court finds that the defendant had "expended and obligated" itself for materials necessary to the work of drilling wells on the two claims in controversy, in the sum of \$2,000.00 or more. This was one day before the order was made. It would seem that on May 6, 1914, a temporary camp had been established on the property. The proceedings

had arrived at the stage we have indicated when the withdrawal order became effective. Not until May 7th—one day after the withdrawal order was made—did any of the materials previously ordered arrive, and not until then was the construction of anything—not even a permanent camp—begun. Upon the foregoing facts Judge Riner held:

“That the defendants were bona fide occupants and claimants of the oil-bearing lands in controversy and were engaged in the diligent prosecution of the work leading to the discovery of oil in commercial quantities on said lands at the date of the withdrawal order made by the President, to wit: the 6th day of May, 1914.”

United States v. The Ohio Oil Company, et al.,
opinion filed in Suit No. 852 (District of
Wyoming), not reported as yet.

The efforts and acts toward the development of the claims in the foregoing case are obviously far outweighed as evidencing both good faith and diligence by the showing made in the case at bar.

THE LAND DEPARTMENT HAS ISSUED ITS FINAL CERTIFICATE OF ENTRY FOR THESE LANDS, AND INQUIRY INTO ANY QUESTION INVOLVING DILIGENCE IS NOW FORECLOSED.

What we have said on this same subject regarding the withdrawal order, applies with *like* force to the question of the sufficiency of a given state of facts to establish the “diligent prosecution of work” required by the Act of Congress.

The Land Office has jurisdiction of such a question. Upon due proceedings had the Register and Receiver has concluded that our showing of diligence entitles us to patents for the claims in controversy and he has taken our money and has issued to us his final receipt.

El Paso Brick Co. v. McKnight, 233 U. S., 250, 257;

United States v. Schurz, 102 U. S., 378, 396.

This Receiver's receipt has the force of a judgment *in rem* binding upon the Government, and cannot be set aside by the courts any more than could a patent in any collateral proceeding.

United States v. McKnight, 233 U. S., 257.

This is not a direct attack. No fraud in our proofs of diligence is here claimed. No mention is made in the bill of our receipt or of these proceedings in the Land Office. Our title cannot now and in this manner be disputed. The Government, therefore, has no case upon the merits.

III.

"DUMMY LOCATORS."

This matter may be summarily dismissed:

The allegation is made that the location notices under which appellant's claim were posted by "mere dummies" to enable "defendant McLeod or some one

else" to secure patents (Tr., p. 11). The verification of the Bill is made by one Dyer, a Special Agent of the Land Office, who expressly disclaims any personal knowledge, but asserts that he has examined records and affidavits, and from these "is informed as to the matters and things stated in the complaint and after investigation believes them to be true" (Tr. No. 2787, pp. 16-17).

A complaint so "verified" is, of course, mere hearsay and cannot be given the force of evidence. It is not an affidavit and cannot have force as such.

Moore v. Thompson, 138 Cal., 26;

Clark v. National Linseed Oil Co., 105 Fed.,
790, 794.

The affidavit of appellant McLeod explicitly and unequivocally denies *in toto* the plaintiff's allegation in this regard (Tr. No. 2787, pp. 74-76).

With the opportunity thus presented for substantiating its charge by a showing in rebuttal, the Government has made no showing whatever.

It would, of course, be absurd if upon this state of the record, a court could give the allegations regarding dummy locations any weight or make the same a basis for appointing a Receiver.

Imagine a private individual presuming to come into court with a request for a receiver of lands long in the possession of another, upon the bald statement—flatly denied under oath—that he believes from what

others have told him, that there is a forged deed purporting to be from his grantor, in the occupant's chain of title!

IN CONCLUSION.

We believe that the Federal Courts have been serious in giving expression again and again to the idea that when the United States Government submits itself to the jurisdiction of one of its courts of equity, it does not thereby become a favored suitor, but is amenable to the same rules and principles that govern the humblest litigant.

If it be true—as judges have indicated—that for the preservation of the liberty of the citizen this principle must be jealously maintained by the courts, then it becomes fitting that we ask the Court what ought to have been done in the Court below had a private individual asked for a Receiver upon this same showing?

Here was appellant Oil Company in possession of the greater part of the two quarter sections of land in controversy.

It had expended \$200,000.00 on the northeast quarter and had purchased it for more than \$500,000.00 (Tr. 2787, p. 123).

On the northwest quarter it had laid out more than \$150,000.00 (Tr. 2788, p. 116).

And its predecessor had expended upwards of \$200,000.00 in such development.

There are ten producing wells on the property.

While this entire work of development was going on for a period of some five years the plaintiff stood by and raised no objection to the work. During all of that time appellant corporation and its predecessors have:

“given to the agents of the Land Department free access to its books and records of all kinds, and the said United States Government has at all times during the said period had actual reports and knowledge of the improvements that the said corporation was making upon said property, and has had access to the books and papers of said corporation showing the amount of oil that it had extracted and was extracting, and showing the contractual obligations which said corporation was under in the matter of its equipment and the disposition of its oil supply;

“That during all of the said time the plaintiff through the officers and agents of its Land Department has had actual knowledge that the defendant, Consolidated Mutual Oil Company, was in possession of the said property under a claim of right, and it has during all of said period of time and until the filing of this suit stood by and knowingly permitted the said defendant corporation, without objection, to make the aforesaid expenditures of money and to extract oils from said properties and to incur obligations in and about the development of said property, and to develop the said property to its present condition and to extract therefrom the very oil the value of which it is here seeking to recover” (Tr., No. 2788, pp. 116-17).

More than one year before this action was brought, the plaintiff permitted us to buy this land. Plaintiff took our money and issued to us a Final Certificate of Entry which declares that we are entitled to a patent (Tr., p. 81).

The plaintiff makes no attack upon this Final Certificate. It alleges no fraud in the proofs of diligence which we must have made upon the proceeding

in rem before the Receiver. Our Receiver's Certificate is a muniment of title generally considered conclusive in all collateral proceedings in the courts.

El Paso Brick Co. v. McKnight, 233 U. S., 257.

After having waited for years and watched us make this development and expend this vast sum of money, plaintiff suddenly rushes into a court of equity, and without any allegation or proof of insolvency upon the part of any defendant, demands upon what is at best a most debatable and doubtful showing of title, that a Receiver be instantly appointed.

Would not a Chancellor, if this were the case of a private individual seeking to throw a great business corporation into the hands of a Receiver, say to him that since he had waited so long he could well afford to wait a little longer until the cause should be heard and judgment rendered? We insist that the Court would be bound to do so upon general equitable principles; and in that connection we refer the Court to the words of one of its own judges in *United States v. Land Wagon Road Co.*, 54 Fed., 807, 811-12:

"No good reason can be offered why the United States in dealing with their subjects, should be unaffected by considerations of morality and right which ordinarily bind the conscience. . . . When matter of estoppel arises, the observance of honest dealings may become of higher importance than the preservation of the public domain. It was well said in *Woodruff v. Trapuall*, 10 How., 190, that we naturally look to the actions of a sovereign state to be characterized by more scrupulous regard to justice and a

higher morality than belong to the ordinary transactions of individuals."

But if the general rules of morality are not enough to necessitate the refusal of such an application, then the settled doctrines of Chancery make it clear that no Receiver *pendente lite* should ever be appointed upon such a showing as is before the Court.

"The power of appointing Receivers is one which should be sparingly exercised and with great caution and circumspection, and only where the circumstances relied upon to warrant the appointment are made to appear by clear proof."

23 *Am. & Eng. Encyc.*, 1038.

The reluctance of courts in this particular is increased where the defendant's possession has been long continued.

23 *Am. & Eng. Encyc.*, 1039.

And we further submit that it is settled law that even for the very laudable purpose of restraining waste, the courts require a clear case and that it is only where the title and right to possession are clear and it is evident to the Court that the defendant is wrongfully in possession that a court of equity will assume jurisdiction and grant any relief for the purpose of restraining such waste *pendente lite*.

It cannot be the law that merely because a suitor says that he has title without making any showing under oath which *prima facie* bears out his assertion, a court of equity will grant him an injunction or ap-

point a receiver as of course. If so the rights of owners in possession are upon a footing less secure than has been heretofore supposed.

For the foregoing reasons appellants respectfully urge that the order appointing a Receiver was erroneous, and that it should be reversed.

Respectfully submitted.

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BRIEF AND ARGUMENT FOR APPELLEE

Filed

OCT 19 1916

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Filed this.....day of October, 1916.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

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BRIEF AND ARGUMENT FOR APPELLEE

There are a number of persons and corporations joined with these appellants as defendants below, who have not joined in these appeals, and inasmuch as the parties to the appeals are the same, and the facts and law involved in both cases are practically identical, the appeals will be jointly considered in this brief.

Statement of Cases

The appellants, defendants below, were in possession of and claiming a right to the NE $\frac{1}{4}$, S $\frac{1}{2}$ NW $\frac{1}{4}$, N $\frac{1}{2}$ SW $\frac{1}{4}$ and SE $\frac{1}{4}$ Section 28, Township 31 South, Range 23 East M. D. M., under certain pretended placer mining locations, and at the time the suits were brought had drilled a large number of oil wells on the NE $\frac{1}{4}$ and NW $\frac{1}{4}$ involved in these cases, from which they had extracted and were extracting and converting to their own use large quantities of oil and gas.

The appellee, plaintiff below, claiming ownership and right of possession of said lands and all minerals therein, instituted and is now prosecuting these actions in equity in District Court of the United States for the Southern District of California for the purposes of removing the cloud cast upon its title by the claims of the appellants; to recover both the possession of the land and the value of the oil extracted therefrom; to enforce its general governmental policy with respect to the conservation, use and disposal of its public oil-bearing lands, and the oil therein; to prevent waste by the appellants and others on said lands; for an accounting for and the recovery of the value of the oil taken and converted by the appellants; for *injunctions restraining appellants from further trespassing and removing oil, and for the appointment of a receiver* in each of said causes to take charge of the property involved.

APPLICATIONS FOR INJUNCTION AND RECEIVER—After the filing of the bills of complaint (Tr. p. 4) and the issuance and service of subpoenas *ad respondendum* the appellee served notices under which applications for the issuance of orders restraining the defendants from trespassing upon the lands and for the appointment of a receiver were made and granted pending the final disposition of the cases.

Statement of Facts

The verified bills of complaint (Trs. p. 4) were offered in evidence by the appellee in support of its applications for an injunction and the appointment of a receiver in each of the cases, and tended to prove the following facts: That the appellee was, on and after the date of the withdrawal hereinafter mentioned, the owner of and entitled to the possession of all the lands involved in each of the causes, and of all minerals therein; that on September 27, 1909, all of said lands were duly and regularly withdrawn and reserved by the President from all forms of entry, acquisition or appropriation under the mineral land laws of the United States, and were not after that date subject to exploration for minerals, or to occupation, or the institution of any rights; that notwithstanding these facts the appellants, in violation of law and of said withdrawal order, and the rights of the appellee, and to its great and irreparable damage, and to the great and irreparable injury to said lands, and by interference with the execution of its public policy

with respect to said lands, went thereon long subsequent to the date of said withdrawal, and wrongfully took possession thereof without having discovered oil, gas or other minerals, and thereafter without having any right so to do, drilled a large number of oil and gas wells thereon, produced and disposed of large quantities of oil and gas, and were at the time of filing said bills of complaint continuing so to do; that none of said appellants, nor any person under whom they claim, was at the date of said withdrawal a bona fide occupant or claimant of said land and in the diligent prosecution of work leading to the discovery of oil or gas thereon; that each of said appellants claims some right or interest in the land and in the oil and gas extracted under and through certain pretended notices of locations of mining claims, and by and through certain conveyances or contracts directly or mediately from pretended locators of such pretended locations under which no discoveries had been made, and that the said pretended location notices under which appellants claim were not made for the use and benefit of said locators but for the sole use and benefit of the appellant J. M. McLeod, under and through whom the appellant Consolidated Mutual Oil Company now claims.

In further support of, and in opposition to the applications, affidavits and documents (Tr. 2787, pp. 63 to 142, and Tr. 2788, pp. 56 to 135) were offered in evidence.

The evidence offered tends to establish the following facts:

Appellant McLeod claims title to *all the lands in said Section 28* through conveyances from persons who pretended to have made placer mining locations therefor on January 1, 1909, under which a final certificate embracing the NW $\frac{1}{4}$, NE $\frac{1}{4}$ and SE $\frac{1}{4}$ of said section was issued to him as such transferee on October 31, 1914, under his application for a patent to said lands, but no patent has issued thereunder;

On June 25, 1909, McLeod in writing leased to one James W. Mays for the use and benefit of the Mays Oil Company, under whom appellant Consolidated Mutual Oil Co. now claims the NE $\frac{1}{4}$, the S $\frac{1}{2}$ NW $\frac{1}{4}$, the N $\frac{1}{2}$ SW $\frac{1}{4}$ and the SE $\frac{1}{4}$ of said section.

This lease provided that the lessee would, on or before July 15, 1909, erect a suitable derrick for drilling oil wells on each of said tracts, install a complete standard drilling outfit including a rig and tools on one of the tracts, and begin actual drilling thereon on or before August 12, 1909, and thereafter diligently continue drilling "until oil is struck in quantities deemed paying quantities by the second party (Mays) or further drilling becomes useless or unprofitable in the judgment of the second party." It was further stipulated that actual drilling should be begun on the other three tracts within thirty days after oil was discovered in paying quan-

tities on the tract first drilled. The Mays Oil Company, for whose benefit the lease to Mays was made, and under whom appellant Consolidated Mutual Oil Company now claims, at some time after June 25, 1909, and before September 27, 1909, erected and completed a skeleton derrick on each of the leased tracts, a bunk house on the S $\frac{1}{2}$ NW $\frac{1}{4}$, a bunk house, a cook house and a water tank on the NE $\frac{1}{4}$ and a stable for horses on the SE $\frac{1}{4}$. A water pipeline was laid, and the derrick on the N $\frac{1}{2}$ SW $\frac{1}{4}$ was fully equipped and drilling for oil was begun before September 27, 1909, and thereafter continued, with incidental intermissions, until oil was discovered on that tract. The buildings mentioned above were, on September 27, 1909, and thereafter, occupied by the employees engaged in drilling on the SW $\frac{1}{4}$, but no work leading to the discovery of oil or gas was being done on either the NW $\frac{1}{4}$ or the NE $\frac{1}{4}$, involved in this appeal, on September 27, 1909, or at any time thereafter until the spring and summer of 1911; and oil was not discovered on either of these tracts until the summer of 1912.

The appellants claim that a lack of available water prevented the Mays Oil Company from drilling oil wells on the NW and NE quarters during the years 1909 and 1910.

Order Granting Application for Appointment of Receiver

Upon the facts disclosed by the evidence the Court below made its orders granting the applications for the appointment of receivers (Tr. 2787, pp. 51 and 55, Tr. 2788, pp. 44 and 49) and assigned as a reason therefor, that "In my judgment the present status of the property in these cases should be maintained, either by enjoining the withdrawal of oil, or by the appointment of a receiver, until the right of the defendants to withdraw oil from the land is finally determined either by the land department or by the Court. It seems to me that the appointment of a receiver will work less hardship to the defendants than the granting of an injunction." By the interlocutory decree (Tr. 2787, p. 56, Tr. 2788, p. 50) a receiver was appointed in each case, and defendants below were enjoined from removing oil and gas or other property from the land, pending final hearings, except by permission and under the direction of the said receiver.

From these orders these appeals have been taken.

Assignment of Error Insufficient

The first assignment of error is too indefinite and general to entitle it to consideration, in that it states that the Court "erred in appointing a receiver upon the pleadings, evidence and proofs before the Court."

Rule 11 of the Rules of this Court (C. A. A., 9th Ct.) requires the appellant to file with his petition for appeal

“an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. * * * When this is not done counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.”

In *Doe vs. Waterloo Mining Co.*, 70 Fed. 455, 461 (C. C. A., 9th Ct.), this Court held insufficient, as being too general, a specification of error which read as follows:

“There is error in said decree, in this: that said court, upon the whole evidence, should have rendered a decree in favor of the complainant.”

In that case the Court said:

“There are nine assignments of error in the transcript. In the brief seven additional assignments of error are made. Appellee maintains that the court not consider these additional assignments; that rule 11 of this court precludes the court from considering them, except on its own motion. The contention of the appellant is that the additional assignments are only specifications under the first assignment of error. (Quoted above.) Rule 11 of this court requires that the assignments of error shall be separately and particularly set out. *The object of setting forth assignments of error is to apprise the opposite counsel and the court of the particular legal points relied upon for*

reversal of the trial court. The attempt to make the assignments of error more particular in the brief is not proper. It is in fact an attempt to amend the record in this particular without permission of court.” (Italics supplied.)

The Court then quoted the specification repeated above and said:

“This is too general. There is no specification showing wherein the decree is not supported by the evidence.”

See also

Andrews et al. vs. National F. & P. W. Co.,
76 Fed. 166;

McFarlane vs. Golling, 76 Fed. 23;

Mitchell T. Co. vs. Green et al., 120 Fed. 49;

Mayor of Baltimore vs. State of Maryland,
166 Fed. 641.

Discretionary Power of Trial Court

Before considering the questions presented by the appellants' second, third, fourth and fifth assignments of error, it will be profitable to consider the principles which control the exercise of a trial court's power to issue injunctions and appoint receivers; and *the extent to which the exercise of that power will be controlled by appellate courts.*

It is a well established doctrine that the question as to whether injunctions will be issued or receivers will be appointed, *pending litigation*, as in these cases, is one which rests wholly within the sound

judicial discretion of trial courts sitting as courts of equity, under the peculiar circumstances of each particular case:

“The appointment of a receiver *pendente lite*, like the granting of an interlocutory injunction, is to a considerable extent a matter resting in the discretion of the court to which the application is made, to be governed by a consideration of the entire circumstances of the case.”

High on Receivers (3d Ed.) Pr. 7.

See also

Beach on Receivers (2d Ed.) Pr. 7;

Smith on Receivers, Pr. 5(a).

Mr. Justice Brewer, in speaking for the Supreme Court in *Bosworth vs. Terminal etc.*, 174 U. S. 182, 186; 43 L. Ed. 941, 943, said:

“But the appointment of a receiver is a matter resting largely in the discretion of the court—not, of course, an arbitrary but a legal discretion—* * *”

See also

City of Kankakee vs. American Water Supply Co., 199 Fed. 757, 760;

South & North Alabama etc. vs. R. R. Commission, 210 Fed. 465, 482;

Milwaukee & M. R. R. Co. vs. Soutter, 2 Wall 510, 17 L. Ed. 900, 904;

Verplanck vs. Caines, 1 Johns (N. Y.) Ch. 57;

Lattimer vs. Lord, 4 E. D. Smith (N. Y.) 183;

Chicago etc. Co. vs. United States Co., 57 Pa. 83;

Hanna vs. Hanna, 89 N. C. 68.

Review by Appellate Courts

While the statute authorizes appeals to the Circuit Court of Appeals from actions of the District Court in granting injunctions and appointing receivers (Jud. Code, Pr. 129, 36 Stat. at L. 1087), it is a well recognized fact that appellate courts in such cases, as in other cases where the action complained of resulted from the exercise of a discretionary power, presumes, in the absence of a clear showing to the contrary, that the trial court exercised its discretion without abuse, and will not ordinarily reverse and set aside the action appealed from, until the appellant, who is burdened with that duty, has made it clearly appear that the action complained of was improvidently taken upon a wholly erroneous comprehension of the facts or the law of the case, and has shown clear proof of an abuse of its discretion.

The law has vested that discretion in the trial court alone, and not in the appellate courts; and it is not, therefore, for the appellate court to say whether under the facts disclosed it would have taken the action complained of, but rather to determine whether there has been such a clear abuse of the lower court's discretion as will warrant the setting aside of its act, and this will not be done where the facts are in dispute, the evidence is conflicting, the questions of law involved are doubtful, or the issues are important, or where the property in dispute is likely to be irreparably injured if left in the possession of the appellant.

“The Circuit Court of Appeals may, but rarely will review the exercise of its discretion by the Circuit Court upon the granting or continuance of an injunction or the appointment of a receiver; but if there is no equity in the bill it will dissolve the injunction or the receivership, as the case may be, even it has been held when the point is not suggested in the assignment of errors nor raised in the court below.” Foster Fed. Prac. (5th Ed.) Vol. 1, p. 935.

“The merits will not generally be investigated, and the order of the court below will be affirmed unless an abuse of legal discretion is shown; or violation of the rules of equity controlling the exercise of the court’s discretion.”

Rose’s Code of Federal Procedure, p. 293.

In *Texas Traction Co. vs. Barron G. Collier*, 195 Fed. 65, 66, Judge Shelby in speaking for the Circuit Court of Appeals (5th Ct.), said:

“This is an appeal from an order granting an injunction *pendente lite*. Formerly, the granting of such order was in the absolute discretion of the primary court; no appeal being allowed. The Act of March 3, 1891, allows an appeal from such decree. 26 Stat. 826. Since this act was passed, its uniform construction has been that the granting of an injunction pending the suit is in the sound discretion of the trial court, and that its order will not be disturbed on appeal unless it is violative of the rules of equity, or unless there has been an abuse of discretion, or unless the injunction has been improvidently allowed. The appellate court is not to decide as to what it would have done as to allowing the injunction, but it must

recognize that the law has imposed on the primary court the responsibility of the exercise of this power, and unless there has been a plain disregard of the law or of some settled rule of equity which should govern the issuance of injunctions so that it appears clearly that the injunction is issued improvidently, the decree should not be reversed. *Kerr vs. City of New Orleans*, 126 Fed. 920, 924, 61 C. C. A. 450; *Lehman vs. Graham*, 135 Fed. 39, 67 C. C. A. 513; *Massie vs. Buck*, 128 Fed. 27, 62 C. C. A. 535; *Clark vs. McGhee*, 87 Fed. 789, 31 C. C. A. 321; *Love vs. Atchison, T. & S. F. Ry. Co.*, 185 Fed. 321, 107 C. C. A. 403."

This announcement followed the doctrine laid down by the Circuit Court of Appeals for the Third Circuit in the case of *Northern Securities Co. vs. Harriman et al.*, 134 Fed. 331, 340, as follows:

"Upon appeal from an order granting a preliminary injunction, a reviewing court is not called upon, ordinarily, to enter into and decide the merits of the case, and unless the court below, in granting the preliminary injunction, has violated some rule of equity or abused its discretion, or acted improvidently, this court should not interfere with its discharge of the responsibility and duty imposed upon it. 'The right to exercise this discretion has been vested in the trial courts. It has not been granted to the appellate courts, and the question for them to determine is, not how they would have exercised this discretion, but whether or not the courts below have exercised it so carelessly or unreasonably that they have passed beyond the wide latitude permitted them, and violated the rules of law which should have guided their action'."

It is not through the exercise of a discretionary power residing with the appellate court that it can reverse the action of the lower court in granting an injunction or appointing a receiver.

“The granting or withholding of an interlocutory injunction rests in the sound judicial discretion of the court of original jurisdiction, and, where that court has not departed from the equitable rules and principles established for its guidance, its orders in this regard may not be reversed by the appellate court without clear proof that it has abused its discretion. An appeal from such an order does not invoke the judicial discretion of the appellate court. The question is not whether or not the appellate court would have made or would make the order. It is to the discretion of the trial court, not to that of the appellate court, that the law has intrusted the granting or refusing of such an injunction, and the question here is: Does the proof clearly establish an abuse of that discretion by the court below? *Massie vs. Buck*, 128 Fed. 27, 31, 62 C. C. A. 535, 539; *Love vs. Atchison, T. & S. F. Ry. Co.*, 185 Fed. 321, 330, 107, C. C. A. 403; *High on Injunctions* (4th Ed.) Sec. 1696; *Higginson vs. Chicago, B. & Q. R. R. Co.*, 102 Fed. 197, 199, 42 C. C. A. 254, 256; *Interurban Ry. & Terminal Co. vs. Westinghouse E. & Mfg. Co.*, 186 Fed. 166, 170, 108 C. C. A. 298, 302; *Kerr vs. City of New Orleans*, 61 C. C. A. 450, 454, 126 Fed. 920, 924; *Thompson vs. Nelson*, 18 C. C. A. 137, 138, 71 Fed. 339, 340; *Societe' Anonyme Du Filtre Chamberland Sys. Pasteur vs. Allen*, 33 C. C. A. 282, 285, 90 Fed. 815, 818; *Murray vs. Bender*, 48 C. C. A. 555, 559, 109 Fed. 585, 589; *U. S. Gramophone Co. vs. Seaman*, 51 C. C. A. 419, 423, 113 Fed. 745, 749.”

Fireball Gas Tank & I. Co. vs. Commercial Acetylene Co., 198 Fed. 650, 653.

See also

City of Kankakee vs. American Water Supply Co., 199 Fed. 757, 760.

The trial court must have acted upon a wholly wrong comprehension of the facts or the law of the case, before its order will be set aside on appeal.

Louisville & N. R. Co. vs. Western Union Tel. Co., 207 Fed. 1, 4;

Interurban Ry. & T. Co. vs. Westinghouse Elec. & Mfg. Co., 186 Fed. 166, 170;

City of Shelbyville vs. Glover, 184 Fed. 234, 238.

The appellate court will not disturb an injunction which prevents irreparable injury to the complainant, and cannot seriously injure the defendant unless it is *entirely* clear from the record that there is no equity in the bill.

Coram vs. Ingersoll, 133 Fed. C. C. A. 1st Ct. 226.

Appellate court will not, in cases such as these, ordinarily review disputed questions of fact, and will not undertake to enter upon or determine the merits.

“Upon an appeal from an order granting or continuing an injunction the Circuit Court of Appeals will ordinarily not review disputed questions of fact arising from contradicting

affidavits when there has been no cross-examination, especially before issue enjoined." Foster Federal Practice (5th Ed.), p. 934.

See also

R. R. Commission vs. Rosenbaum Grain Co.,
130 Fed. 110;

James vs. Wild Goose M. & T. Co. (C. C. A.,
9th Ct.), 143 Fed. 868.

In the case of *McCarthy et al. vs. Bunker Hill S. M. & C. Co.*, 164 Fed. (C. C. A., 9th Ct.), 927, 940, this Court, in sustaining an injunction, said:

"Each case must be considered and made to depend upon its own particular fact and circumstances, in the consideration and determination of which the general rules governing courts of equity are to be borne in mind and applied. Among those rules is the well-established one that an appellate court will not ordinarily interfere with the action of the trial court in either granting or withholding an injunction in cases in which the evidence is substantially conflicting, and especially where the trial judge, at the request of the respective parties, has had the benefit of a personal inspection of the premises."

See also

King Lumber Co. vs. Benton, 186 Fed. 458.

Dimmick vs. Shaw, 94 Fed. 266, 268.

BURDEN ON APPELLANTS TO SHOW ABUSE OF DISCRETION—In the recently issued *Corpus Juris* (Vol. 4, p. 789) a large number of cases are cited to support the statement that

“Since it will be presumed, on appeal, in the absence of a showing to the contrary, that the discretionary powers of the lower court have been exercised without abuse, the burden of showing abuse is on the party complaining.”

One of the cases thus cited, and which amply sustains the text, is *Heinze vs. Boston & M. C. etc.*, 20 Mont. 528, 52 Pac. 273, involving an appeal from an order granting an injunction.

Rules as to Issuing Injunctions Are Applicable to Appointment of Receivers

It may possibly be contended that inasmuch as the authorities cited above involve cases in which injunctions alone were considered, and in which receiverships were not involved, they do not sustain the contention here made that the doctrines they announce and follow apply to appeals from orders appointing receivers.

The right of appeal from orders of each of these classes is given by the same statute (36 Stat. 1087), and the appointment of a receiver, as well as the issuance of an injunction rests in the sound discretion of the trial court. The two remedies are coupled and the doctrines as to the court's dis-

cretion in relation thereto are simultaneously announced and considered by the leading text writers.

High on Receivers (3d Ed.) pr. 7;

Beach on Receivers (2d Ed.) pr. 7;

Smith on Receivers, pr. 5(a);

Bosworth vs. Terminal etc., 174 U. S. 182, 186, 43 L. Ed. 941, 943.

FACTS SUPPORTING AN INJUNCTION WILL JUSTIFY A RECEIVERSHIP—It is admitted that, as a general rule, facts which will ordinarily be sufficient to justify an injunction may not be such as will support the appointment of a receiver, but it is appellee's position that under the peculiar circumstances of these cases any facts which would justify an injunction will justify a receivership.

It is true that the courts are slow to appoint receivers in cases involving the possession only of real estate where the estate is not being consumed or irremediably damaged by the use; but these general rules do not apply in cases involving mineral lands, or in other classes of cases where the *corpus* is being taken or destroyed pending final action.

The courts depart from the general rule and resort to receiverships instead of injunctions where the former is a less harsh and injurious means of protecting the property pending litigation than the latter would be. The same rule has been applied in cases involving properties which constitute public

utilities, such as railways, and possibly water, gas or electric plants—"going concerns"—where serious injuries to the general public might result if the properties were forced into inactivity through injunctive orders, and again in cases where a cessation of operation by an injunction would contravene a public policy, or result in an irreparable injury to the property itself.

Both public policy and the protection of the property against waste suggested the course taken by the District Court, and the issuance of the form of the order appealed from in these cases.

The preservation of the property from injury resulting from cessation of operation will warrant a receivership instead of an injunction. This doctrine is referred to in *High on Receivers* (3d Ed.) pr. 615, as follows:

"The aid of a receiver is sometimes granted in cases of mines or collieries pending a litigation which is to determine the title and rights of the parties, when, from the peculiar nature of the property, it is necessary that it should be kept in operation and preserved *pendente lite*.

In *Gibbs vs. David*, Law Rep. 20 Eq. Cas. 373, 376, the Court sustained a receivership on the ground that

"the property is a colliery, and a going colliery, and both sides admit that it must be kept going or the lease will be forfeited; and, moreover, if it is not kept going, to be drowned out; and,

therefore, it is absolutely necessary that it should be worked."

In *Elk Fork Oil & Gas Co. vs. Foster et al.*, 99 Fed. 485, 498 (C. C. A., 4th Ct.), each party asked for an injunction to prevent the other from taking possession of certain oil and gas land, and the lower court, finding that there was danger that irreparable injury would result from a cessation of work, of its own motion appointed a receiver to operate the wells. An appeal was taken from that action by one of the parties, and on appeal the Court said:

"As it was deemed necessary that the property must be operated, the only question was who should operate it. Each side craved permission to do so. The court would not consent to give either party this authority, and preferred to select its own agent,—to name its own receiver. The appointment of a receiver was the necessary corollary to the case presented. 'Working of mines is something more than the common and ordinary use of real estate, and requires the use of more than ordinary remedies to protect the rights of a party entitled to the possession. The granting of an injunction, and, if necessary, the appointment of a receiver, are common remedies.' 15 Am. & Eng. Enc. Law, p. 605."

In *Mead vs. Burk*, 60 N. E. 338, 339, the Supreme Court of Indiana said:

"As a general rule where the property in dispute appears to be exposed to danger and loss, and the person in possession or control thereof has not a clear legal title or right there-

to, the court, on the application of a person interested therein, will interpose and appoint a receiver for the security or preservation of the property pending the litigation. High Rec. (3d Ed.), Sec. 11; Smith, Rec., Sec. 5."

In *Nevada Sierra Oil Co. vs. Home Oil Co.*, 98 Fed. 673, before the Circuit Court for the Southern District of California, Judge Ross said:

"The subject of controversy in this suit is a piece of public land of the United States, containing under its surface petroleum, and to which both the complainant and the defendant claim to be entitled under and by virtue of the mining laws. As the defendants are extracting large quantities of oil from the ground, and prevent the complainant from doing the work thereon required by the laws of the United States in order to make good its alleged claim, an application has been made by it to the court for the appointment of a receiver to take possession of the property, and operate it, and do the required work, pending the litigation, for the benefit of the party that may ultimately be adjudged to be entitled to it; the respective parties agreeing that by reason of the operation of wells on adjoining lands no injunction ought, in any event, to be issued, because such action would necessarily result in the draining of a large part of the oil from the land in controversy by those operating the adjoining territory. Upon the hearing of the application a large amount of testimony was introduced on behalf of the respective parties, consisting in great part of conflicting affidavits. In respect to this conflict of evidence the court would not undertake, at this stage of the case, to make a decisive determination; but if the proof, taken as a whole, shows reasonable ground for the complainant's claim to the land in question,

then, clearly, it will be the duty of the court to appoint a receiver to take possession of it pending the litigation, to the end that the annual work required by the laws of the United States may be performed for the benefit of the party who may ultimately prevail in the suit, and in order to conserve the property for the benefit of the party entitled thereto, and prevent the extraction and disposition, pending the litigation, of the oil, which the proof shows constitutes the chief, if not the only, value of the land."

WHEN RECEIVERSHIPS ARE LESS HARSH—It appears, therefore, that the Courts readily appoint receivers in cases where the best interests of all parties require it, rather than an injunction which would prevent the operation of the property when necessary to protect it from damage. In the cases now under consideration, Judge Dooling, for that reason, appointed a receiver with certain proper discretionary powers, instead of issuing injunctions which would have entirely prevented further operation of the wells in any event.

In cases such as these the Courts have said that even a showing of the insolvency of the persons in possession is not necessary to the appointment of receivers.

In *Waskey vs. McNaught et al.* (C. C. A., 9th Ct.), 163 Fed. 929, 937, this Court said:

"The absence of an allegation in the affidavits filed in support of the motion for injunction charging the defendants were insolvent is im-

material. The alleged injury is irreparable in itself.”

See also

34 Cyc., 57, 58;

1 Beach, Sec. 35, 40;

Thomas vs. Nantahala & Talc Co., 58 Fed. 485, 488;

Nutter vs. Brown, 1 L. R. A. (N. S.) 1085, 1090;

Mead vs. Burk, 60 N. E. (Ind.) 338, 340.

Inasmuch as both the granting of injunctions and the appointment of receivers rest within the discretion of the trial courts, and in view of the fact that receiverships may be resorted to instead of injunctions, in cases like those now under consideration, it seems incontrovertible that the consideration of appeals from the appointments of receivers must be controlled by the well-established rules under which consideration is given to appeals from the issuance of injunctions.

It will be assumed, therefore, that this Court will affirm the order appealed from unless it clearly determines from the record and matters, as presented by these appeals, that the orders complained of were improvidently made upon a wholly erroneous comprehension of the facts or the law of the case, and that it will not from the conflicting testimony of record undertake to say whether it would have, in the first instance, taken different actions.

There Is at Least a Probability That Appellee Will Recover

SECOND ASSIGNMENT OF ERROR—We find in the second assignment a contention that a receiver should not have been appointed because it has not been shown that

The appellee probably has the right to, and will probably recover the lands involved and the possession thereof in these suits.

As has been indicated by some of the authorities already cited above, and as is abundantly established by other authorities, it is the well-established rule that in actions such as these courts are not called upon to, and will not at this juncture fully determine questions of title or right of possession, and will not go fully into the merits of the case.

Mr. High, in his work on Receivers, lays down the general rule (pp. 8, 9, 3d Ed.) when he says:

“And if the plaintiff presents a *prima facie* case, showing an apparent right or title to the thing in controversy, and that there is imminent danger of loss without the intervention of the court, the relief may be granted without going further into the merits upon the preliminary application. Indeed, upon an interlocutory application for a receiver, a court of equity usually confines itself strictly to the point which it is called upon to decide, and will not go into the merits of the case at large, since the court is bound to express its opinion only to the extent necessary to show the grounds upon which it disposes of the application.”

See also

Waskey vs. McNaught et al. (C. C. A., 9th Ct.), 163 Fed. 929, 937.

In *Buskirk vs. King*, 72 Fed. 22, the plaintiff, claiming under a grant from the State of West Virginia, brought ejectment against defendant, who answered that the grant under which plaintiff claimed had been forfeited, and set up title in himself through another source. The defendants appealed from an interlocutory decree by which an injunction was granted restraining them from cutting timber from the land *pendente lite*, and the Circuit Court of Appeals (4th Ct.), in affirming the decree said:

“In such matters the plaintiff is not required to make out such a case as will entitle him to a decree in his favor on final hearing, and it sometimes happens that he ultimately fails to secure the relief asked for, while, nevertheless, the granting of the preliminary injunction is entirely proper. * * * And this is particularly so in cases where the value of the property in dispute consists of timber standing on the land, or in minerals in it.”

In *Hunt vs. Stesse*, 75 Cal. 620, 624, the Supreme Court considered a case in some respects similar to *Buskirk vs. King*, *supra*, and there said:

“In cases of this kind an injunction should be granted pending the determination of the issue as to ownership, unless it appear that the plaintiff's title is bad, or at least, that there is no reasonable ground for the assertion of title by

the plaintiff. The mere existence of a doubt as to the title does not of itself constitute a sufficient ground for refusing an injunction."

GOVERNMENT OWNERSHIP PRESUMED—It was not incumbent upon the appellee to produce evidence of its ownership originally of the lands in question, or of its right of possession, because the Courts know judicially, as an historical fact, that the title to them passed to the United States by the treaty of Guadeloupe Hidalgo, which became and is a part of the law of the land, and as such is already known to the courts.

United States vs. Reyner, 9th How. 127,
18 L. Ed. 74;

Lewis vs. Harris, 31 Ala. 689, 699.

The title having been once vested in appellee it, and all of its appurtenances must be presumed to remain there until the contrary is shown by competent evidence.

Gardner vs. Green et al., 8 Ala. 86;

People vs. Feilen, 58 Cal. 218;

Kidder vs. Stevens, 60 Cal. 414, 419.

APPELLEE'S EVIDENCE SUSTAINS THE APPOINTMENT.—Aside from the foregoing consideration the appellee's application for the appointment of a receiver is amply sustained by the evidence offered.

The facts set up in the verified bills of complaint (Tr. 2787, p. 4 and Tr. 2788, p. 4) are sufficient

and were held by the trial court to be sufficient, if proved on the final hearing, to warrant not only injunctions and receiverships, but to fully support decrees granting all the relief sought by the appellee. A bill of complaint practically identical with the bills here involved was sustained by this Court on appeal in the case of *El Dora Oil Company et al. vs. United States*, 229 Fed. 946.

The bills of complaint were offered in evidence in support of the motions for injunction and receiver, and their probative effect is attacked by the appellants' fifth assignment of error on the ground that they were "not so verified that they could be used for that purpose, inasmuch as it appears that the affiant had no personal knowledge of the facts alleged."

This objection goes to the weight rather than to the admissibility of the evidence, and, even if the trial court's action was based solely on this evidence, independent of other evidence and considerations, that fact would not show such a clear abuse of its discretion as to warrant a reversal of its action. Authorities need not be mentioned to support the doctrine that an appellate court seldom, if ever, disturbs the action of the trial court when a contention that findings of fact by the trial court are against the weight of the evidence is the only question presented on appeal.

But the objection is, for other reasons, not well taken. While the affiant who verified these bills of

complaint specified the sources of his information, he stated that from these sources "he is informed as to the matters and things stated" in the bills of complaint, and he then swears, not upon "information and belief", but positively and unequivocally, that the matters and things stated in the bill as facts "are true." What were the "matters and things" stated in those bills which were essential to the appointment of receivers? They were the statements that the appellee owned and was entitled to the possession of the land, and that the appellants were wrongfully trespassing upon and extracting oil to the irreparable damage of the lands.

And what were the sources of information from which affiant obtained a knowledge of these facts? They were, as his affidavit says, his personal examination of the lands themselves, which showed him that the appellants were in possession of and taking oil from the land, and they were his personal examination of the records of the General Land Office, the local land offices, and the Court and County records which disclosed the status of the title to the lands. To what better sources could the affiant have gone than to these to obtain a knowledge of the facts he swears are true?

APPELLANTS' ADMISSIONS SUSTAIN THE COURT'S ACTION—The appellants are here claiming as the grantees of the appellee, under mineral locations which were admittedly invalid at the date of the

withdrawal because no discovery of minerals had then been made on the lands they cover. They have also admitted that they went upon the lands and extracted oil therefrom, and they seek to sustain their claim to title, and to justify their trespass by attempting to show such facts as to their possession and diligence at that time and thereafter as would under the law validate their locations and give them a right to a patent. The defense is a confession and avoidance. They cannot, therefore, deny appellee's title if they have failed to show their own; and *they have, therefore, burdened themselves with the duty of showing that there is no probability that the appellee will eventually recover in these cases.*

The third assignment of error does no more than to raise a question as to

The Effect of the Withdrawal of September 27, 1909

The appellants contend that the lands involved, although described in the withdrawal order of September 27, 1909, were not affected by it because the pretended locations embracing them, coupled at that time, and thereafter, with actual possession and diligent prosecution of work leading to discovery of oil or gas, made them such "valid locations or claims" within the meaning and intent of the words of that order, as excepted the lands from withdrawal and left them subject to claimant's possessory rights

which ripened into perfected mining claims when oil was finally discovered.

The language of the withdrawal order is as follows:

“In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain, all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry or disposal under the mineral or non-mineral public-land laws.”

This order contained at its end the following saving clause:

“All locations or claims existing *and valid* on this date may proceed to entry in the usual manner after filing, investigation and examination.”

Before the appellants' contention that these lands were not affected by that withdrawal order can be sustained, it must be concluded that it was intended in that order that placer mining locations under which no discovery of minerals had been made should be considered as “*valid* locations.”

It will be observed that all lands described in the order of withdrawal were withdrawn “from all forms of location, settlement, selection, filing, entry or disposal” under both the mineral and *non-mineral* public land laws, and that the saving clause refers as well to “settlements”, “selections”, “filings”, and “entries” of non-mineral lands as to

“locations” under the mineral laws. The saving clause of the order uses the words “valid locations or claims”, and inasmuch as the word “locations” is generally used in connection with mineral lands, and not as specifying an interest in non-mineral lands, and in view of the fact that the words “settlement”, “selections” and “filings” are never used in connection with mineral lands, it is reasonable to conclude that the word “claims” was used as relating to and protecting existing “settlements”, “selections”, “filings” or “entries” embracing non-mineral lands only.

This order refers to and protects the *acts* or *procedure* of appropriating lands, and not to the lands themselves when it mentions “locations”, “selections”, “filings” and “entries”, and the words “locations” and “claims” as there used were not used as synonyms, or intended to be so construed. They are separated by the disjunctive “or”, and were intended to be used in and given their ordinarily accepted significance.

“‘LOCATION’ AND ‘MINING CLAIM’ DEFINED—
‘Location’ and ‘mining claim’ may not always or necessarily mean the same thing. The Supreme Court of the United States has said that a mining claim is a parcel of land containing precious metal in its soil or rock.

A location is the act of appropriating such parcel according to certain established rules. The ‘locations’ in time became among the miners synonymous with the ‘mining claim’ originally appropriated.” Lindley on Mines (3d Ed.) 327.

The word "claims" is never used to indicate the procedure leading up to a patent to mineral lands.

If these suggestions justify the conclusion that interests in mineral lands are protected by the use of "locations" only, and not by the use of the word "claims" it must necessarily follow that the pretended locations in these cases did not except these lands from the segregating effect of the withdrawal order because the saving clause protects only "valid locations", and there can be no such thing as a valid location or valid claim prior to discovery.

McLemore vs. Express Oil Co., 112 Pac. 59;

Mining Co. vs. Tunnel Co., 196 U. S. 337;

Waskey vs. Hammer, 223 U. S. 85.

This conclusion cannot be overcome by the suggestion that a withdrawal order would not and could not affect mineral locations which were supported by an actual discovery, and that it was intended to protect locations such as these, in the absence of a discovery, when they were supported by actual possession and diligent prosecution of work leading to a discovery of mineral.

If appellants' contention is correct, then the saving clause in Section 2 of the Act of June 25, 1910 (36 Stat. 847), commonly known as the Pickett Act, was an unnecessary and useless piece of legislation. That Act protected "any person, who at the date of any order of withdrawal heretofore or

hereafter made, is a bona fide occupant or claimant of oil or gas-bearing lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, * * * so long as such occupant or claimant shall continue in diligent prosecution of said work.”

Congress must be said to have legislatively construed the saving clause of the withdrawal order as being insufficient to protect interests such as are protected by that Act, or it would not have done an idle thing by enacting the Act.

Again it is reasonable to assume that if the saving clause of the withdrawal order had been intended to give the relief extended by the Pickett Act, more specific language, wording similar to that used in that Act, would have been used in that order.

The Courts had announced that a mere paper location, in the absence of an actual discovery, conferred no rights upon the pretended locators, and especially so as against the United States. *Borgwardt vs. McKittrick Oil Co.*, 164 Cal. 650. It had, however, been held before the withdrawal order, that the occupancy and claim under such a location afforded protection against forcible or fraudulent intruders, to one who “in good faith makes his location, remains in possession, *and with diligence prosecutes his work toward discovery.*” *Miller vs. Chrisman*, 140 Cal. 440, 447; 73 Pac. 1085.

See also

Chrisman vs. Miller, 197 U. S. 313.

The language thus used was practically adopted in later decisions by the Courts (*McLemore vs. Express Oil Co.*, 158 Cal. 559), and by Congress in the Pickett Act, and it is reasonable to assume that if it was intended that similar protection as against the Government had been intended by the saving clause in the withdrawal order similar language would have been there used instead of "valid existing claims", and "valid locations."

To say that the saving clause of the withdrawal order is without effect if it means what it really says, "valid locations", is to charge not only the President but also the Congress of the United States with repeatedly doing a useless and ineffective act, because Congress has frequently used similar language for similar purposes, an instance of which is found in the Act of May 11, 1910 (36 Stat. 354), which created, withdrew land for, and fixed the boundaries of the Glacier National Park, and specifically provided:

"That nothing herein contained shall affect any *valid existing claim, location*, or entry under the land laws of the United States or the rights of any such claimant, locator or entryman to the full use and enjoyment of his land."

But even if it be conceded that the saving clause in the withdrawal order was intended to and did

protect persons who were in actual possession under invalid locations or claims which were not valid at the date of the withdrawal, and who were then, and thereafter continued in the diligent prosecution of the necessary work, these appellants cannot here invoke that protection because, as will be hereinafter noticed, they were not then or for nearly two years thereafter prosecuting the necessary work *on these lands* with diligence or otherwise.

The Pickett Act Does Not Protect These Appellants

The fourth assignment of error presents only the following questions:

(1) Were the appellant McLeod and the Mays Oil Co. under whom appellant Consolidated Mutual Oil Company claims, at the date of the withdrawal order such “*bona fide* occupants or claimants” of the lands here involved as entitled appellants to claim the protection of the Pickett Act, and

(2) Were they on that date and thereafter in such “diligent prosecution of work leading to discovery of oil or gas” on the lands *here in dispute*, as will justify a patent, if it be found that they were *bona fide* occupants or claimants?

(1) MCLEOD AND MAYS OIL COMPANY WERE NOT *BOXA FIDE* OCCUPANTS OR CLAIMANTS—It is alleged as a fact in paragraph XI of each of the bills of complaint (Tr. p. 11) that the locations under which these appellants claim were not made for the

individual use and benefit of the persons by whom they pretend to have been made, but were made for the benefit of appellant McLeod or some other persons, and, in so far as this allegation was proved by the introduction of the bills of complaint in evidence, it has been established by the appellee at the hearings of the motions here involved; but it is denied under oath by appellant McLeod, and, although none of the pretended locators have been called to testify, it may be here considered as a disputed fact such as this Court, on an appeal of this kind, is not called upon to settle.

But it is earnestly contended that, aside from the question of bad faith involved in the making and recording of the locations, there is ample evidence to show that McLeod and the Mays Oil Company did not on the date of the withdrawal, or for a long time thereafter hold these lands in good faith as contemplated and required by Congress in the passage of the Pickett Act.

FACTS SHOWING MALA FIDES are found in the lease executed by appellant McLeod to James W. Mayes for the benefit of the Mays Oil Company, and offered in evidence by the appellants in each of the cases (Tr. 2787, pp. 95 to 101, and Tr. 2788, pp. 90 to 109). That lease stipulates that a derrick should be erected on each of the four tracts of land mentioned in it, of which the lands in dispute were two tracts, on or before July 15, 1909. It was evidently intended that these derricks, erected long

before they were needed for drilling purposes, were to be erected at an early date in defense of the pretended locations, as mere scare-crows, to warn prospective locators from the lands, and as mere "assessment work," which has no place in the law until after discovery.

That there was at the date of this lease an intent in the minds of both McLeod and the Mays Oil Company not to drill on any of the other three tracts, and an intent to keep others from doing so, until after oil had been discovered on the tract first drilled is fully shown by the fact that it was further stipulated in the lease that a complete standard drilling outfit, including rigs and tools, should be installed *at one of the four derricks*, and that drilling was to be continued there until oil was "struck" at that point in paying quantities, *or further drilling became unprofitable*.

If oil was not discovered on the tract first drilled the lessee was under no obligation to drill on either of the other three tracts; and that there was not at the date of the lease, or at any other time until about a year and a half after the date of the withdrawal, *any present intent to drill* more than one tract is fully shown by the fact that the lease contained a stipulation that drilling should begin on the other three tracts within thirty days after the lessee had concluded that oil had been discovered in paying quantities on the first tract. The lessee was under no obligations to the lessor to drill on more than one tract until he had discovered oil, and if he failed

to find oil in paying quantities on the first tract his contract brought him to the end of his obligations to McLeod.

McLeod and his lessee were, therefore, mere idlers with respect to these lands, seeking to prevent claims, occupancy or development thereon by others, and to monopolize and hold them for themselves until it should, in certain contingencies, seem to be for their benefit to begin work on them. The first well was not drilled on either of the tracts here in dispute.

The lack of available water for the drilling of more than one well at the same time, now plead by the appellants as an excuse for lack of diligence, was not then in the minds of McLeod and his lessee, and found no place in their lease as a justification for lessees' failure to drill more than one well if he had found oil in the first well.

That they did not intend to drill on three tracts until oil had been found on the fourth, finds confirmation in common experience, but no justification under the law for a claimant such as McLeod. This land was comparatively untested territory, and had not been found to contain oil. No other wells had been or were being drilled within less than one and one half miles of this land.

UNDER THESE FACTS WERE THEY "BONA FIDE OCCUPANTS OR CLAIMANTS" WITHIN THE MEANING OF THE PICKETT ACT?—It was evidently not the in-

tent of Congress to protect persons who were claiming large areas of land simply because they were at work on one claim. It has always been the Government's policy to distribute its bounty in public lands as widely as possible among its citizens, and to this end it has limited the area each mineral claimant may acquire under one location to twenty acres, or eight persons to one hundred and sixty acres. It cannot, therefore, be said that Congress intended that a liberal interpretation of the Pickett Act should give protection to the holder of a large number of claims when he was working on only one of them, and it certainly was not intended to extend a benefit to one who acquired a large number of claims in order that he might hold them all speculatively until he had found oil on one of them.

WHO ARE BONA FIDE CLAIMANTS—These considerations lead to the conclusion that a “bona fide occupant or claimant” within the intent and purposes of the Pickett Act is *one who is in possession of and holding the land in good faith and with the honest purpose and present and unequivocal intent to do the things (and who is so doing, diligently and continuously) thereon which are necessary to the acquisition of title under the mining laws.*

In defining “*bona fide* pre-emption claimant,” Mr. Justice Field, speaking for the Court in *Hosmer vs. Wallace*, 97 U. S. 575, 581; 24 L. Ed. 1130, 1132, said:

“It was intended to designate one who had settled upon land subject to pre-emption, with

the intention to acquire its title, and had complied, or was proceeding to comply, in good faith, with the requirements of the law to perfect his right to it."

In *Rutledge vs. Murphy*, 51 Cal. 388, 393, it was said:

"The term *bona fide*, as applied to a pre-emption claimant in the proviso to the eighth section of the act, must be deemed to have some meaning, and was intended to designate one who, having the proper qualifications, in good faith settled upon a parcel of land which was subject to pre-emption, with the intention to pre-empt it, and who had performed, or at least was proceeding in good faith to perform, the necessary conditions."

Section 3, Act May 14, 1880 (21 Stat. 140) gives a preferred right of entry to one who settles on public land, but no such right is acquired by mere occupancy and cultivation when the occupant does not have a fixed intent to acquire title (*Northern Pacific Ry. Co. vs. McCormic*, 89 Fed. 659), or by one who makes settlement for the ulterior purpose of acquiring valuable timber, or for any purpose other than that of establishing a home.

Wright vs. Larson, 7 Land Dec. 555;

Benson vs. State of Idaho, 24 L. D. 272.

The degree of good faith, and its manifestation necessary to protect a location made before actual discovery, were considered by the Supreme Court of California before the passage of the Act of June 25, 1910, in the following cases:

In *Miller vs. Chrisman*, 140 Cal. 440, 447, it was said that:

“One who thus in good faith makes his location, remains in possession, and with due diligence prosecutes his work to discovery, is fully protected against all forms of forcible, fraudulent, surreptitious, or clandestine entries and intrusions upon his possession.”

In *McLemore vs. Express Oil Co.*, 158 Cal. 559, it is said that:

“What the attempting locator has is the right to continue in possession, undisturbed by any form of hostile or clandestine entry while he is diligently prosecuting his work to discovery. This diligent prosecution of the work of discovery does not mean the doing of assessment work. It does not mean the pursuit of capital. It does not mean any attempted holding, by cabin, lumber pile or unused derrick. It means the diligent, continuous prosecution of work, with expenditure of whatever money may be necessary to the end in view.”

If McLeod and the Mays Oil Company were not *bona fide* claimants the defense set up in these cases must fail.

Interpretation of the Pickett Act

But if it be determined that appellant McLeod and the Mays Oil Company were such *bona fide* occupants and claimants as were entitled to invoke the protection of the Pickett Act, it will then become necessary to ascertain whether they, at and after the date of and after the withdrawal, did the work necessary to that end.

It is not contended that they were doing any work on these particular tracts in dispute on September 27, 1909, the date of the withdrawal, or thereafter during the years 1909 and 1910, but it is claimed that the work they did on the N $\frac{1}{2}$ of the SW $\frac{1}{4}$ of that section which adjoined one of these tracts and cornered with the other was “work leading to discovery of oil or gas” *on the tracts in dispute*.

This contention calls for a close scrutiny and an interpretation of the Pickett Act, and for that purpose we must look to the intent and purpose of the act as manifested by its language, by the relief it was intended to afford, and by the burdens and duties it imposed; and this must be done in the light of the conditions then existing, and the laws then in force, as well as from the words used in its enactment.

PURPOSE OF THE PICKETT ACT—It was a well and long established doctrine that a mineral claimant could not, prior to actual discovery on the tract claimed, gain any paramount right as against the Government, or any right which prevents the Government from withdrawing the land from disposal under the mineral land laws (Lindley on Mines, 216 and cases there cited); and it is equally well settled that when any qualified person is in possession of public lands with a *bona fide* intent to acquire title *under any public land law* which recognizes occupancy as being necessary to the acquisition of title, *and is diligently doing all the things necessary to*

such acquisition, his rights cannot be defeated by any other person who by force or fraud intrudes upon his possession. That this doctrine applies to claimants who have attempted to make premature locations under the mineral land laws, locations so made before actual discovery, is too well settled to call for citation of authorities; and the Pickett Act was evidently passed for the purpose of so extending the protection afforded by this doctrine as to prevent the inchoate rights of such claimants from being defeated by governmental withdrawals.

That Congress was asked to extend, and had in mind the extension to the Government of the doctrine that such rights could not be defeated by a wrongful intruder is evidenced by the following quotation from the published hearings before the House Committee on Public Lands when that Act was under consideration, of which this Court will take judicial notice. (May 13 and 17, 1910.)

Mr. Weil, who now appears as attorney for these appellants at that hearing, said:

“The effect of that decision (of the Supreme Court of California) was this:

“Mr. Chairman: Under the placer mining law the placer miner has no rights between the time of location and the time of discovery. But where a man has located a piece of placer mining ground—for oil, for instance—and it takes him two or three years to validate his location by making a discovery, the courts have held that during that period of time, so long as he is operating in good faith and attempting to make

a discovery on the land, no one else can initiate a valid location against him by clandestine or surreptitious entry.

“Mr. Robinson: What cases have held that?

“Mr. Weil: One of them is the case of *Miller vs. Chrisman* (140 California).

“Mr. Chairman: Was that between two mineral claimants?

“Mr. Weil: Yes, sir; not as against the Government. The difficulty here is that we concede that we have no rights against the Government until we have made a discovery (Page 6).”

And that Congress was asked to, and intended to do no more than extend to and impose upon the Government the spirit of the rule the courts had invoked for the protection of such claimants against forcible and fraudulent intruders is apparent, not only from the language of the Act itself, but from the further statements made at the hearing before the committee above referred to.

Mr. Pickett, by whom the bill was introduced in Congress, said at that hearing:

“I should like to ask this question of some of these gentlemen here who are authorized to speak for the California delegation (of oil claimants seeking relief) present. How much or how little (whichever way you want to put it) do you think a man should do upon one of these locations to come within the protection of the law?”

To this inquiry Mr. Ewing replied:

“Let Mr. O'Donnell answer that. He is the most practical oil man present.”

Mr. O'Donnell then answered, in part, as follows:

"It is hard to determine just where the pursuit of discovery commences; but it has got to be legitimate and continuous. That is the line of all the decisions in all the cases we have had in California, when contests have been raised over these lands. * * * As a practical man, knowing nothing about law, I would say that if a provision is inserted in this bill following out the line of those decisions and the practice they have led to, I believe it will protect the interests of those that are expending money in an effort to make these discoveries, and that any pretense to that end will not acquire these lands."

That this suggestion was followed, and that a proviso was inserted in the bill "following out the line of those decisions" of the Court is plainly evident from the wording of the Act. It affords protection to "*bona fide* occupants or claimants" who were "*in the diligent prosecution of work leading to discovery,*" and the decision in *Miller vs. Chrisman*, to which the attention of the Committee had been specifically called by Mr. Weil, says that protection against intruders who resort to force or fraud shall be given to one who "*in good faith makes his location, remains in possession, and with due diligence prosecutes his work to discovery.*" (Italics supplied.)

The language used by Congress in this Act is so practically identical with that used by the Supreme Court of California in *Miller vs. Chrisman*, *supra*, and again repeated in *Borgwardt vs. McKittrick Oil*

Co., *supra*, and so similar to the language used by that Court in *McLemore vs. Express Oil Co.*, *supra*, as to justify the assumption that Congress not only intended to extend the principle of the rule recognized in those cases but, practically, adopted the language of the Court in doing so.

But that Congress intended to do more than extend the rule announced by the Court, and that it extended protection only upon the same terms and conditions imposed by the Court must also be conceded. The Act, as did the rule, announced by the Court, required location notices to be posted and boundaries to be marked, an occupancy and claim, in good faith, and required the same diligence and continuity in the prosecution of work, and the same kind of work, and that the Act was not intended to enlarge the rule of the Court, or to give claimant larger rights against the United States than formerly existed against intruders, is shown by the fact that the Act itself expressly declares that it "shall not be construed as a recognition, abridgement or enlargement of any rights or claims," etc.

Inasmuch as the provisions of the Pickett Act are practically identical with the rule announced in the decisions referred to, and was enacted in the light of those decisions, we are with assurance justified in looking to those decisions for the correct interpretation of that Act, for the ascertainment of its requirements, because:

"It is a familiar and fundamental rule for the interpretation of a legislative statute that

it is presumed to have been enacted in the light of such existing judicial decisions as have a direct bearing upon it,"

In re Moffit's Estate, 153 Cal. 359; 95 Pac. 653, 654), and

"A statute must be construed in the light of the unwritten law" (36 Cyc.), and

"Statutes are not to be understood as affecting any change in the law beyond what is expressed or is necessarily implied from the language used."

36 Cyc., 1145.

WORK AND DISCOVERY REQUIRED—Turning to the decisions of the Court to ascertain the meaning and significance of the words "work" and "discovery" used in the Act, we find that the Supreme Court of California, in defining "work," in *McLemore vs. Express Oil Co.*, *supra*, said:

"This diligent prosecution of work of discovery does not mean the doing of *assessment work*. It does not mean the pursuit of capital to prosecute the work. It does not mean any *attempted holding* by *cabin*, *lumber pile* or *unused derrick*. It means the diligent, continuous prosecution of work, with the expenditure of whatever money may be necessary *to the end in view*."

This language was quoted with approval by Judge Bean in his decision, rendered May 1, 1916, in the case of *United States vs. Midway Northern Oil Company* and five other similar cases upon which final decrees were entered. 232 Fed. 619.

And in *Borgwardt vs. McKittrick*, *supra*, the Court said:

“Clearly, the mere ‘figuring’ with other persons by the locator as to what they will charge for the doing of such work, or the making of an effort to find some one who will do such work at a price satisfactory to the attempting locator
* * * cannot be construed as a diligent prosecution of the work of discovery.”

See also:

Ophir Silver Mining Co. vs. Carpenter, 4 Nev. 438;

United States vs. Midway Northern Oil Co. et al., *supra*.

Smith vs. Union Oil Co. (Cal.), 135 Pac. 966;

United States vs. McCutchen et al. (unpublished), (So. Dist. California).

WORK MUST BE SUCH AS GIVES NOTICE—In determining the object and character of the “work” required by the Pickett Act, it will be helpful to keep in mind the mandatory demands for notice which the law makes upon all persons who seek title to public lands.

The law provides two methods by which claims to public lands may be first initiated, which are (1) by taking possession of a particular tract and doing such acts thereon as will *furnish notice to all subsequent comers* of the claimant’s possession and intent to acquire title, such as making “settlement” under the homestead, townsite and pre-emption laws (Secs.

2263, 2264, 2387, R. S. U. S., and Sec. 3, Act May 14, 1880, 21 Stat. 140), "opening and improving a coal mine" (Secs. 2348 and 2349 R. S. U. S.), and making "location" (after discovery) on mineral lands (Sec. 2322 R. S. U. S.); and (2) by the presentation of written applications to enter at the United States Land Office for the district in which the lands desired are located.

In order that the public shall have knowledge of existing rights, and to avoid conflicting and adverse claims, the giving of *ample notice* of the initiation of a claim is among the mandatory requirements of the public land laws.

Homestead and pre-emption claimants are not only required to maintain substantially continuous possession, evidenced by improvements, but they, as well as coal land claimants, are compelled to protect their claims by placing their applications of record in the local land office within a limited time, so that they will disclose their claims. The law is even more exacting as to mineral claimants. It demands both the posting and recording of written notices; it requires possession to be maintained, and calls for the recording of "proofs of work" showing, after discovery, annually, work or improvements on each claim amounting to one hundred dollars; and no claimant can acquire title to public lands under any of these laws without both posting notices on the land and continuously publishing notices in the newspaper pub-

lished nearest the land for from thirty to sixty days before he applies for patent, and doing the necessary work. (Sec. 2325 R. S. and Act March 3, 1879, 20 Stat. 472.)

WORK MUST BE ON THE PARTICULAR TRACTS—In the light of these general requirements, and in view of the emphasis which the law gives to its demand for notice, it can be safely said that the “work” contemplated by the Pickett Act, coupled with possession and diligence, must have been such work *upon the tract in question*, or so closely related thereto and accompanied with possession thereof as to plainly indicate to all persons coming upon the tract that it was then being claimed and worked under the mineral land laws.

This conclusion finds support in the decisions of both the Courts and the Land Department.

The Federal Circuit Court for Nevada, in speaking of the character and acts of possession which are necessary to prevent wrongful intrusion, said in *Garrard vs. Silver Peak Mines*, 82 Fed. 578, 591, that the law required “such acts to be performed as are necessary to subject the land to the will and control of the claimant, sufficient to *notify the public* that the *land is claimed* and occupied and is in the possession of claimant.” (Italics supplied.)

Possession and “work” necessary to give a mineral claimant exclusive possession as against intruders are closely akin to the “settlement,” and

acts thereunder which give paramount rights to a settler under the homestead and pre-emption laws, and

“The rule is, that to constitute a settlement the settler must go on the tract claimed and do some act connecting himself with said tract, and the act must be equivalent to an announcement of intention to claim the land from which the public generally may have notice of the claim. (*Samuel M. Frank*, 2 L. D. 628; *Fuller vs. Gibbon*, 15 L. D. 231.) It must consist of some substantial and visible improvement, having the character of permanency, with intent to appropriate the land. (*Howard vs. Piper*, 3 L. D. 162, 163).”

Hunter vs. Blodgett, 20 L. D. 452, 454.

If, as these decisions seem to abundantly show, the “work” required must be such as will give notice to the public of the fact that a particular tract is being claimed and worked under the mineral land laws, such work must be actually performed upon or obviously and closely related to that tract (the tract being in possession), and it necessarily follows that the drilling of a well on the southwest quarter would not give notice of the claim to the other quarters of the section, and the Courts have said that a cabin or unused derrick will not answer the demands of the law for such work.

KIND OF “DISCOVERY” CONTEMPLATED BY PICKETT ACT—But aside from these considerations we find that the Act calls for work leading to a “discovery,” which necessarily means such a discovery as will

support a location, and will justify a patent. *Congress could not have had in mind a discovery on any other tract than the one to be excepted from the withdrawal.*

The word "discovery," when used in connection with the mineral land laws, has a technical and well defined meaning, and Congress must be presumed to have known that meaning, and to have intended that it should be given to that word as used in that Act.

When mineral rights are asserted to a particular tract they must be *based upon a discovery within that tract* itself. There can be no such thing as a "discovery," in the sense in which that word is used in the mineral land laws, until mineral has been actually found within the claim in connection with which it is used.

Sec. 2320 R. S. U. S.;

Lindley on Mines, 337;

Gwillim vs. Donneland, 115 U. S. 45, 50, 29
Law. Ed. 348;

Larkin vs. Upton, 144 U. S. 19, 23, 36 Law.
Ed. 330.

It has been further said, in support of this proposition, that—

"The discovery of valuable mineral deposits outside of the claim; or deductions from established geological facts relating to it; one or

all of which matters may reasonably give rise to a hope or belief, however strong it may be, that a valuable mineral exists within the claim will neither suffice as a discovery thereon, nor be entitled to be accepted as the equivalent thereof."

East Tintic Consolidated Mining Company,
40 L.D. 272, 273.

Even if the discovery of oil on the southwest quarter strongly suggested the existence of oil in the other quarters, it cannot be said that the drilling of a well on the former tract was work leading to the discovery of oil on the latter tract, notwithstanding the fact that it might have induced the drilling of a well thereon, because,

"To constitute a discovery the law requires something more than conjecture, hope or even indications. The geological formation of the country may be such as scientific research and practical experience have shown to be likely to yield oil in paying quantities. Taken with this there may be other surface indications, such as seepage of oil. All these things combined may be sufficient to justify the expectation and hope that, by driving a well to sufficient depth, oil may be discovered, but one and all they do not of and in themselves amount to a discovery."
Miller vs. Chrisman, supra.

See also

Nevada Sierra Oil Co. vs. Home Oil Co., 98 Fed. 673;

Weed vs. Snook, 144 Cal. 439.

The Theory of Group Development Cannot Be Applied Under the Pickett Act

It cannot be successfully contended that the drilling on the N $\frac{1}{2}$ of the SW $\frac{1}{4}$ was tantamount to work leading to a discovery of oil on the tracts in dispute in these cases under the statutory rule which recognizes that the doing, after discovery, of what is usually called "annual assessment work" and "patent work or expenditures" on one of a group of contiguous mining claims held in common ownership under valid locations will protect the rights of the claimant to all the claims embraced in the group.

In considering this question it will be helpful to keep clearly in mind the object and purposes of the Acts of Congress requiring the different kinds of work to be performed; the kinds and character of work required, and the purposes for which it must be performed.

Section 2324 R. R. U. S. provides that—

"On each claim located after the tenth day of November, Eighteen Hundred and Seventy-two, and until patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. * * * But where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure shall occur, shall be open to revocation in the same manner as if no location had ever been made, provided that the original locators, their heirs,

assigns or legal representatives, have not resumed work upon the claim after failure and before such location."

Section 2325 R. S. U. S. says that a mineral claimant shall be entitled to a patent to a "claim or claims" upon showing, among other things, "that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors;" and the Pickett Act says that the rights of *bona fide* occupants or claimants shall not be impaired if they are, at the date of the withdrawal, "in diligent prosecution of work leading to discovery" so long as they "shall continue in diligent prosecution of such work."

The purposes of the requirements of Sections 2324 and 2325 were "to require every person who asserted an exclusive right to his discovery or claim to expend something of labor or value as an evidence of his good faith, and to show that he was not acting on the principle of the dog in the manger." (*Chambers et al. vs. Harrington*, 111 U. S. 350.)

The claimant's failure to meet the requirements of those sections did not work a forfeiture on his claim to the Government, as did the failure of one claiming under the Pickett Act. It only left him subject to lose if an intervenor claimed the land, as required by law, when claimant's assessment work had not been done, as required, after discovery.

The sections mentioned (other than the Pickett Act) relate to claimants who held under valid locations supported by actual discoveries—locations, the recorded notices of which imparted knowledge to all the world that the land was claimed; and such claimants are not required to remain continuously in possession, or to continuously perform the required labor; while a claimant under the Pickett Act and the cases cited must rely alone upon his open, and notorious adverse possession, and his *continuous and diligent prosecution of work* leading to a discovery to furnish that notice. It cannot be said that Congress had in mind the requirements of these sections when it passed the Pickett Act, or that it intended that “work looking to discovery” should be the same or even kindred to the labor and improvements required of persons holding under valid locations—*i. e.*, those accompanied by a discovery. The Courts have declared that the “assessment work” required by the decisions and by Section 2324 is not the kind of “work” required by that Act. *McLemore vs. Express Oil Co., supra.*

But if it be admitted that Congress did have those sections in mind, and did intend that the “work” required by that Act should correspond with the “labor” and “improvements” required by the existing law we find in that fact a strong reason for contending that “work” on one of a group of claims would not except the others from the withdrawal, because that Act does not so specify, as do other laws. In Section 2324 there is an express legislative

declaration that "where such claims are held in common such expenditures may be made upon any one claim," without which there could be no such thing as "group development," and the Pickett Act *does not contain such a declaration.*

GROUP DEVELOPMENT DEFINED—There is an essential element in "group development" which is not found in this case. Mr. Lindley correctly and plainly states this element when he says that:

"The burden or proof is on the owner to show that the work done or improvements made (after discovery) do, as a matter of fact, tend to the development of the property as a whole, and that such work is a part of a general scheme of improvement." *Lindley on Mines*, 630.

It is well established that the group development specifically sanctioned by Sec. 2324 R. S. U. S. must be such work as will result in such development as *will facilitate the ultimate extraction or production of mineral* from each and every claim within the group, and not such work as will merely tend to, or do no more than indicate the existence of mineral in all the claims. The theory of group development has relation to the extraction of minerals, and not to the original discovery of minerals, which is prerequisite to a valid location, and it relates to claims by a person who has already made a discovery on each claim of the group, and who, therefore, already has a vested right to each claim.

That there must be a valid discovery on each tract before the theory of group development can

be invoked is clearly deducible from the decision of the Supreme Court of California in *Smith vs. Union Oil Co.*, 135 Pac. 966, 969.

In that case it was urged that the drilling of a well on an adjoining tract and within a thousand feet of the land in dispute was such work as entitled the claimant to invoke the Act of February 12, 1903 (32 Stat. 825), commonly known as the Five Section Act, and the Court answered that that act "cannot be construed to include or refer to work done upon a claim to accomplish a discovery thereon in order to perfect the location."

GROUP DEVELOPMENT BEFORE DISCOVERY NOT SANCTIONED BY STATUTE—The theory of group development can be invoked in this case only on the assumption that Congress intended that work on one tract leading to a discovery there should be accepted as work leading to a discovery on each of the other tracts of the group of which it formed a part.

The words used in the Pickett Act do not justify that assumption, and such an intent is negatived by it.

It is an original and fundamental provision of law that the area of a placer mining location is limited to twenty acres, and that annual assessment work amounting to \$100.00 and a patent expenditure of \$500.00 must be made *on each claim* of that area.

The only departures which have been made from these requirements have been *made in express words by statutory enactment*. The association of two or not more than eight twenty-acre claims in one location by two or not more than eight persons *is specifically authorized*; the privilege of performing, after discovery, assessment work on one of a group of claims *is expressly authorized* by Section 2324 R. S.; the privilege of claiming credit for the cost of tunnels outside of the claims is *the result of express enactment* (18 Stat. 315), and the privilege of doing assessment work on any one of five contiguous oil claims after discovery to the credit of the entire group was *expressly given* by the Act of Congress of February 3, 1903 (32 Stat. 825).

In no case has a departure from the original requirements been made by mere implication, and there is nothing in the Pickett Act which shows even an implied intent on the part of Congress to sanction "work" on one of a group in lieu of work on each claim of that group for the purpose of making discovery.

ECONOMIC DEVELOPMENT—The fact that a prudent man who owned four adjoining quarters would ordinarily not drill on more than one tract at a time, or that he could more economically explore and develop the whole group in that manner does not meet the demands of the situation in this case. He cannot in that way acquire title to what the Government owns.

In furtherance of the theory that development work on one of a group of tracts covered by a valid location must be such as will develop all the tracts of the group, the courts and the Land Department have said that the several tracts must be contiguous.

Notwithstanding this well established rule, group development of non-contiguous tracts was contended for in *Gird vs. California Oil Co.*, 60 Fed. 531, 537, on the ground, among others, "that the stratification of the district in question is so irregular that to work profitably and judiciously it is necessary to develop the territory by successive wells, as expressed by some of the witnesses, 'to feel our way along,' " a plan and a contention close akin to the method pursued by the appellants in this case.

In answer to that contention, the Court in that case, in holding that there must be work on each individual claim, said:

"All this, no doubt, greatly conduces to the profits of the plaintiff's lessees, and is very convenient. But I am unable to see that these facts at all answer the requirement of the law regarding the location and acquisition of placer mining ground, which is the same, whether the mineral it contains be gold, silver, quicksilver, petroleum, or anything else."

Lack of Available Water Did Not Excuse Failure to Drill

The appellants have urged an inability to secure sufficient water as an excuse for their failure to drill for oil on the tracts in dispute until 1911, but this

fact does not excuse their laches or entitle them to the benefits of the Pickett Act.

It has not been shown that McLeod and the Mays Oil Company had any reasonable grounds to expect that they could obtain a sufficient amount of water for simultaneous drilling on each of the four quarters of the section, or that any unforeseeable or unexpected occurrence prevented them from obtaining it. Even that proof would not avail them anything.

The lands were located in an extremely arid country, where water was very scarce, and McLeod, at the date he purchased the locations, and the Mays Oil Company, at the date of its lease, must have known these facts; and knowing them, accepted and assumed all the risks incident to the undertaking, and could not be excused from timely complying with the law which at that time called for diligent work, for drilling, even to protect their claims from relocation by mere trespassers. It will not do to say that their actual possession was enough because the law, both then and now, required diligent and continuous prosecution of work leading to discovery.

The contention that a lack of water excused diligent work was fully answered by Judge Bean in his decision in the case of *United States vs. Midway Northern Oil Company, supra*.

The pleadings and facts there involved are so closely akin to those in the present case, and Judge

Bean in his decision so fully and concisely states the law applicable to them as to justify the following quotations from it. He says, in part, as follows:

“It is urged, however, that they had in good faith signified an intention by filing and recording notices and doing so-called assessment work, to enter the lands under the mineral laws, and that they would have proceeded with work looking to discovery but for their inability to obtain water for use in their boilers and for drilling purposes. The lands in controversy are situate in an arid section of the State, and until late in 1909 or early in 1910 it was difficult if not impracticable to obtain water in sufficient quantities for successful drilling, but I do not think that fact brings the cases within the terms of law.

“There is no intention manifest in the statute, as far as I can see, to protect or confer any rights on those who had merely made a filing prior to the Withdrawal Order, but who were unable to engage in work looking to discovery, but only those who were at the date of the order *bona fide* occupants or claimants of the lands withdrawn and *actually engaged in the diligent prosecution of such work*. None of the defendants comes within this category.”

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“Now, the mere effort, however diligent, to obtain water for drilling purposes, or the inability to do so, which is all the evidence for the defendants tends to show, cannot be held to constitute diligent prosecution of work looking to discovery any more than the pursuit of capital to prosecute such work, or a lumber pile or unused derrick can be held to constitute such diligence. The question is not whether the defendants were able to prosecute the work of

discovery at the date of the Withdrawal Order, but whether they were actually engaged in such work at that time."

The doctrine that one seeking title to public lands assumes all the risks incident to the acquisition of title, and cannot excuse his failure to comply with the law by urging even insuperable obstacles which he knew or should have known when he initiated his right, has long been applied by the Land Department in the administration of the public land laws.

The Act of June 14, 1878 (20 Stat. 113) authorized the patenting of non-timbered public lands to one who grew timber thereon, and as long ago as 1881 it was held that one who for that purpose entered lands in an arid region did so at his own risk, and could not plead arid conditions or lack of water in extenuation of his failure to meet the law's requirements, and this rule has been consistently followed since that date.

Chapman vs. Zweck, 1 L. D. 123;

Andrews vs. Young, 19 L. D. 493;

Reynolds vs. Ramsdell, 23 L. D. 312.

The doctrine has also been applied under other classes of entries.

Equitable Title by Prescription

Although no attempt was made by appellants in their assignments of error to present the question on appeal, it was contended for them in argument in the trial Court that the Consolidated Mutual Oil Company had acquired such an equitable title, through its possession and the possession of its grantors, to the lands in dispute as, under Sec. 2332 R. S., will support a patent, and that, therefore, a receiver should not have been appointed.

It is here suggested and urged on behalf of appellee that this question is not properly before this Court on these appeals, and should not be presented in argument for the reason that it is not either expressly, or even by implication, raised in the assignments of error. Nothing has been said in the assignments of error which in any manner *apprises the opposite counsel or the Court that this particular legal point would be relied upon for a reversal of the trial Court*, such as this Court declared to be necessary in its decision in *Doe vs. Waterloo*, 70 Fed. 455, 461, quoted above, and for that reason it is urged that, under Rule 11 of this Court, counsel should not be heard on this question, except at the request of the Court; and the question would not be discussed in this brief were it not for the assumption that counsel for appellant will again present it in brief and arguments not yet served on counsel for appellee at the date on which this is written.

Section 2332, R. S., upon which this contention is based, reads as follows:

“When such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for the mining claims of the state or territories where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter in absence of any adverse claim.”

This statute does not support the contention made: (1) Because neither this statute, even if it be treated as a statute of limitations, or any other general statute of limitations, applies to the Government; (2) because the appellant did not and could not hold these lands adverse to the Government; and (3) because the statute requires a discovery and compliance with the requirements of the law, and no discovery was made on these lands until long after the lands were withdrawn.

STATUTES OF LIMITATION DO NOT APPLY TO THE GOVERNMENT—The doctrine that statutes of limitation do not apply to the Federal Government is too well known to justify extended consideration.

Redfield vs. Parks, 132 U. S. 239.

That Section 2332 R. S. does not apply to the Government has been frequently declared.

Mr. Lindley, in his work on Mines (3d Ed.), in speaking of this statute, says at page 1717:

“It would seem to recognize the doctrine that as against everyone save the United States, the title to a mining claim may be acquired by possession, use and enjoyment for a period equal to the time prescribed by the statute of limitations.”

Judge Sawyer, in *Mining Co. vs. Bullion M. Co.*, 3 Saw. 634, 645, 11 Morr. Min. Rpts. 608, said that this statute gave a right “as against any person but the United States.”

In *McTarnahan vs. Pike*, 91 Cal. 540, 543, a plea was set up in an action in ejectment that defendant and his grantors had been in possession of the placer mining ground in dispute for more than twenty years at the time the plaintiff made a placer mining entry therefor, and the Supreme Court of California, in denying that plea, said:

“The statute of limitations did not run against the Government * * *. For the mere purpose of proving title by prescription defendants’ alleged adverse possession before plaintiffs entered and paid for the land counted for nothing.”

POSSESSION OF THE LANDS COULD NOT BE ADVERSE TO THE GOVERNMENT—It is well settled that one holding an inchoate right in public lands to which he is seeking title does not hold them adverse to the Government, and his rights are at all times subject to the right of the Government to withdraw or make other disposition of the lands.

In *Nessler vs. Bigelow*, 60 Cal. 98, 101, a claim of adverse possession for fifteen years was set up to defeat an action in ejectment in which plaintiff claimed under a patent issued less than five years before the commencement of the suit.

The Court said:

“But they could not have held adversely to the Government and the action having been commenced within five years after the issuance of patent, the statute of limitations cannot avail them against the patentee.”

See also:

Frisbie vs. Whitney, 9 Wall 187;

Rector vs. Ashley, 6 Wall 142;

Shiver vs. United States, 159 U. S. 491;

Union P. R. R. vs. Harris, 215 U. S. 386;

Roughton vs. Knight, 219 U. S. 537.

SECTION 2332 R. S. REQUIRES DISCOVERY AND WORK—The appellants cannot claim the benefit of Section 2332 R. S., even if they could otherwise do so, because they had not at that date been in possession for five years, and because they had not made a discovery at the date of the withdrawal, and were not then or thereafter for a long time doing the acts essential to the acquisition of title.

That act was passed simply to regulate the patent procedure, to relieve claimants of the necessity of making the formal proofs otherwise required, and not to relieve applicants from doing the other things

required by the mining laws. The regulations (Sec. 75, 34 L. D. 184) issued under that statute require the claimant to furnish with his application for patent "his sworn statement giving a clear and succinct narration of the facts as to the origin of his title, and likewise as to the continuation of his possession of the mining ground covered by his application; the area thereof; *the nature and extent of the mining that has been done thereon,*" etc.

In speaking of the acts of mining required, Mr. Lindley in his work on Mines says:

"The acts of mining should not be merely occasional, fugitive and desultory, but as continuous as the nature of the business and customs of the country permit and require." (3d Ed., p. 1719.)

It was said in Barringer and Adams' Law of Mines, page 569:

"To establish an adverse possession of a mining claim on the public domain, there must be an actual possession of a part, accompanied by a claim of the title to the whole, and continuous working thereon."

In *Upon vs. Santa Rita M. Co.*, 14 N. M. 96, 89 Pac. 275, 283, it was said that:

"Section 2332 does not relieve parties from the obligation to do annual assessment work or compliance with any of the proposed requirements of law antecedent to patent imposed upon the holder of a valid location."

Did the Issuance of Final Certificate Deprive the Courts of Jurisdiction?

The appellants, as defendants below, plead in their answer that an application for patent, under which a final certificate had issued by the Register of the Land Office, had been presented to and is pending before the Land Department and supported that plea by an affidavit offered in evidence at the hearing under the motions for a receiver.

It was argued in briefs filed in the Court below: (1) That the final certificate deprived the Government of all interest in these lands, and for that reason appellee cannot ask the appointment of a receiver, and (2) that the pendency of patent proceedings before the Land Department deprived the Courts of jurisdiction to try the question of title.

Neither of these points is presented in the assignments of error, and it is now urged on behalf of appellee that they should not be either argued or considered on this appeal for the reasons heretofore suggested, unless it be that the last question, that as to jurisdiction, can be raised and considered under the general doctrine that a Court's jurisdiction can be questioned at any stage of a proceeding before it.

While the issuance of a final certificate, as a general rule vests an equitable estate in the entryman, it is not an indefeasible estate, and does not prevent

either the Land Department or the Courts from inquiring into its validity and effect.

Cornelius vs. Kassel, 128 U. S. 456, 461, 32 L. Ed. 482;

Orchard vs. Alexander, 157 U. S. 372, 382, 39 L. Ed. 737.

Johnson vs. Towsly, 13 Wall. 72, 85, 20 L. Ed. 485, 487.

COURT NOT DEPRIVED OF JURISDICTION BY PATENT PROCEEDINGS PENDING BEFORE LAND DEPARTMENT—
This question was lately presented to and decided by Judge Bean in *United States vs. Devil's Den Consolidated Oil Co.* and two other cases, in which the facts, the questions of law, and the contention of defendants were substantially the same as those here under consideration, and sufficient answer to the contention here made by appellants as to the jurisdiction of the trial Court was given by him in that decision, rendered October 4, 1916, and in view of the fact that it is unpublished and not easily accessible the following extended quotation is made from it.

After noting the fact that the charges attacking the validity of defendant's claims in those cases had been preferred under directions from the Commissioner of the General Land Office and were pending before the Local Land Office, Judge Bean said:

“Thereafter these suits were commenced, based upon substantially the same grounds as the

charges filed against the entries in the local Land Office. The defendants plead the pendency of the proceedings before the Land Office in bar, the contention being that the acceptance by the officers of the local Land Office of defendants' application for patent and the purchase price of the land was in effect a judgment *in rem* and vested the equitable title to the land in the defendants, subject only to the appellate jurisdiction of the Land Department, and until such judgment is annulled by the proper authorities within the Land Department, the defendants are entitled to the possession of the property, with the right to extract and dispose of the minerals thereof.

In a contest between private parties over the title or right to the possession of mining property for which patent has not been issued, the doctrine invoked would no doubt be applicable. Where the necessary steps are taken by a qualified applicant to obtain a patent to mining land and no adverse claim has been filed, the applicant becomes vested with the equitable title and a *prima facie* right to a patent immediately upon the payment of the purchase price, and the delay of the Department in issuing patent 'does not diminish the rights flowing from the purchase or cast any additional burdens on the purchaser or expose him to the assaults of third persons.' (*Benson M. Co. vs. Alta M. Company*, 145 U. S. 428; *El Paso Brick Co. vs. McKnight*, 233 U. S. 250.) But such a proceeding does not divest the Government of its title, nor is it an adjudication as between the claimant and the Government. In such a case there is no adjudication by the Land Department of any questions arising on the application for patent. Nor has it been allowed or approved by the Government or any of its officers, and no final certificate has been issued. But if the ap-

plication had been allowed and passed to patent it would not have been conclusive against the Government. (*Washington Securities Co. vs. U. S.*, 234 U. S. 76.) All that has been done in the instant cases is the receipt by the officers of the local Land Office of the application for patent and the purchase price, the transmission by them of the same to the General Land Office and a subsequent filing of objections to the issuance of patent by an agent of the Department. The broad question then is whether the mere acceptance by the Land Office of an application for a patent to a mining claim in due form from a private individual, and the payment by the latter of the purchase money after the required notice has been given, is a bar during the pendency thereof in the Land Department to a suit by the Government to cancel and annul the entry of the applicant, if any, and determine his right to possess and to extract and market the mineral, on the ground that the application for patent and the proceedings connected therewith were and are fraudulent, wrongful and unlawful.

In my judgment it is not. The proceedings are wholly *ex parte* as to the Government and can have no greater effect than if the patent had actually issued, and it is settled law that the issuance of a patent under such circumstances is not a bar to a suit by the Government to vacate or annul such patent if fraudulently and unlawfully obtained, or issued by mistake or inadvertence of the officers of the Land Office. (*Hughes vs. United States*, 4 Wallace 232; *German Iron Co. vs. United States*, 165 U. S. 379; *Washington Securities Co. vs. U. S.*, 234 U. S. 76; *Linn & Lane Timber Co. vs. U. S.*, 236 U. S. 574.) I do not think any greater virtue should be accorded to a mere *ex parte* preliminary proceeding. It is insisted, however, that as the applications for patent are now pending and

undetermined in the Land Department, the Court will not assume jurisdiction even if such applications are fraudulent and unlawful, until they are finally disposed of by the Department. The Land Department is vested, conformably to the Acts of Congress, with the exclusive jurisdiction to determine the rights of claimants to public lands, and until it has exhausted its jurisdiction by the issuance of a patent, a Court will not assume to determine which of two rival claimants is entitled to the property. (*Johnson vs. Towsley*, 13 Wall. 72; *Marquez vs. Frisbie*, 101 U. S. 473.) But the Government is not an adverse party to a proceeding to acquire title to its property, nor is the Land Department a tribunal to which it must submit its rights or litigate with one who has taken possession of its property or has attempted to acquire title thereto. The notice required by statute of an application for patent to a mining claim is designed and intended to cut off the rights of private claimants and not the Government of the United States. It is given in order that all persons having adverse claims may be heard in opposition to the issuance of the claim, and makes no issue on the statement of the claimant. When, therefore, he succeeds by misrepresentations, by fraudulent practices, aided by perjury, there would seem to be more reason why the United States, as the owner of the land of which it has been defrauded by these means, should have remedied against that fraud—all the remedy which the Courts can give—than in the case of a private owner of a few acres of land on whom a like fraud has been practiced.

I am of opinion, therefore, that the Court has jurisdiction to try the questions involved in these cases. If, however, I am mistaken as to the extent of the jurisdiction, the Government is clearly entitled upon the allegations of the bill and the showing made to invoke the aid of

a Court of Equity to protect the property from waste and destruction pending the final determination of its rights therein in the Land Department out of the Court.” (*Northern Lumber Company vs. Ryan*, 124 Fed. 819; *El Dora Oil Company vs.* 229 Federal 246.)

Even where lands have ceased to be public lands by pre-emption, homestead and like claims but to which claimant has not perfected his title, they are still so far public lands of the United States that the Government may protect them from waste. (*Shiver vs. U. S.*, 159 U. S. 491.)

The Land Department has no general equitable power. It cannot grant injunctions, appoint receivers, nor, by its orders or decrees prevent trespass upon or protect the public domain from spoliation. It is true under the Act of Congress of August 25, 1914, the Secretary of the Interior is authorized in his discretion to enter into agreements with a certain class of applicants for patents for oil and gas lands included within an order of withdrawal, relative to the disposition of oil or gas produced therefrom. This is a discretionary power probably intended for the benefit and to protect from liability these; but (Sec. 2325) says:

“If no adverse claim shall have been filed it shall be presumed that no adverse claim exists, and thereafter, no objection from third persons to the issuance of patent shall be heard except it be determined that the applicant has failed to comply with the terms of this chapter.” Sec. 2325 R. S.

If, however, an adverse claim is filed during the period of publication, the adverse claimant is required by Section 2326 to commence within 30 days thereafter proceedings in a Court of competent jurisdiction to determine the same, thus clearly showing that the purpose of the

statute is to make the proceedings binding on private parties and not the Government. There is no reason to be found in the relation of the Government to such a proceeding which will deprive it of the same right to relief if the proceedings are fraudulent or unlawful as an individual would have in regard to his own contract procured under similar circumstances. Indeed, there are reasons why it should not be denied the right to invoke the aid of a Court by the mere receipt and acceptance of an application for a patent and the purchase price by an officer of the local Land Office, for, as said by Mr. Justice Miller in *U. S. vs. Miner, supra*:

“In nine cases out of ten, perhaps in a much larger percentage, the proceedings are wholly *ex parte*. In the absence of any contesting claimant for a right to purchase or secure the land, the party applying has it all his own way. He makes his own purchase, sworn to before those officers, and he produces affidavits. If these affidavits meet the requirements of the law, the claimant succeeds, and what is required is so well known that it is generally reduced to a formula. It is not possible for the officers of the Government, except in a few rare instances to know anything of the truth or falsehood of these statements. In the cases where there is no contesting claimant there is no adversary proceeding whatever. The United States is passive; it opposes no resistance to the establishment of the trespassers, those who in the judgment of the Secretary have mistakenly trespassed upon land not open to entry and in good faith expended money in prospecting for oil and in the development and the improvement of the property. In one of the cases now under consideration an application for such a contract has been made and denied by the Secretary on the ground and for the reason that suit was then pending in this

Court. His reasons for refusing to enter into the contract are not the subject of review here. It is enough that no such contract has been made."

It may be helpful in the consideration of this question, and supportive of Judge Bean's decision, to suggest that these are withdrawn lands, and are no longer "public lands" subject to disposal under the public land laws, and are for that reason not subject to the jurisdiction of the Land Department.

By Art. IV., Sec. 3 of the Constitution, the power of absolute control and disposal of the public domain is vested in the Congress, and such authority as the Land Department can exercise in relation to it comes through express delegation by Congress.

By Sec. 441 R. S.

"the Secretary of the Interior is charged with the supervision of public business relating to the following subjects:

* * * * *

Second: The public lands, including mines."

Sec. 453 R. S. provides that

"the Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and issuing patents for all land under the authority of the Government."

It will be observed that the authority here delegated by Congress relates only to “public domain” and “public lands” and these words have been repeatedly defined by the Supreme Court.

In *Baker vs. Harvey*, 181 U. S. 481, 490, it was said:

“‘Public domain’ is equivalent to ‘public lands’ and these words have acquired a settled meaning in the legislation of this country. The words ‘public lands’ are habitually used in our legislation to describe such as are subject to sale or disposal under general laws. *Newhall vs. Sawyer*, 92 U. S. 161, 163; 23 L. Ed. 769. The grant is of alternate sections of public lands, and by ‘public lands’, as has been long settled, is meant such land as is open to sale or other disposition under general laws. *Bordon vs. N. P. R. Co.*, 145 U. S. 535, 538; *Mann vs. Tacoma Land Co.*, 153 U. S. 273, 284.”

In *Baker vs. Harvey*, *supra*, the Court remarked:

“It could not be well said that lands which were burdened with a right of permanent occupancy were a part of the public domain and subject to full disposal of the United States.”

In *Newhall vs. Sanger*, *supra*, the Court held, as was said in syllabus:

“Grants of land to aid in constructing works of internal improvement, do not embrace tracts reserved by competent authority, for any purpose or in any manner, although no exception of them were made in the grants themselves.”

The discussion of this question will not here be extended further than to call attention to the following decisions:

Wilcox vs. Jackson, 13 Pet. 498, 10 L. Ed. 264;

Steel vs. St. Louis S. & R. Co., 16 Otto 447, 27 L. Ed. 226, 228;

United States vs. Carpenter, 111 U. S. 347, 28 L. Ed. 451;

United States vs. Des Moines N. & R. Co., 142 U. S. 510, 35 L. Ed. 1099.

Ancillary Relief

Even if it be held that the pendency of patent proceeding before the Land Department deprived the Courts of the power to hear and determine the principal issues joined in these cases, that fact does not prevent the Courts from taking such action by the appointment of a receiver, or otherwise as will protect the property and preserve its *status quo* until the questions of title and right of possession are determined by that department or otherwise.

Northern Lumber Co. vs. Ryan, 124 Fed. 819;

El Dora Oil Co. vs. United States, 229 Fed. 946;

United States vs. Devils Den Oil Co., *supra*;

Shiver vs. United States, 159 U. S. 491;

Hunt vs. Stesse, 75 Cal. 620.

In conclusion it is urged that upon the whole case it does not appear that there was any abuse of the discretion of the lower Court, and that, therefore, its action should not be reversed.

E. J. JUSTICE,
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For the Ninth Circuit

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a corporation, and J. M. McLeod,
Appellants,

VS.

THE UNITED STATES OF AMERICA,
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Filed

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REPLY BRIEF IN BEHALF OF APPELLEE

F. P. HOBGOOD, Jr.,
FRANK HALL, and
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Attorneys for Appellee.

Filed this.....day of November, 1916.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.



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Reply Brief in Behalf of Appellee

This reply brief, filed under leave of the Court, obtained at the time of the oral argument, is addressed to certain contentions of the appellants

made in all of the three cases under submission and to others directed to certain phases of the different cases. This brief indicates in which of the several cases the points under discussion are raised, unless raised in all.

Appellants Are Not Within the Clause of the Taft Withdrawal Order Providing for Entry in Cases of "Locations and Claims Existing and Valid."

In all three of the cases it is contended that the pertinent order of withdrawal exempts appellants from the effect of the order. That clause relied upon reads: "All locations and claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination." The clause is misquoted on page 30 of the Government's brief, as elsewhere in the records in this case. (The word "filed" should be "field".) A certified copy of the order is filed with the Clerk. The appellants contend that the words, "All locations and claims existing and valid" include "a location or claim not perfected by discovery of oil." (See Appellants' brief, top of page 6.) The position of the United States is that the word "location," as contained in the order of withdrawal, was employed in the sense in which it is used in the Mining Law. On page 2 of appellants' brief it is admitted that "a mining location on the public land confers no rights prior to actual discovery, which Congress is bound to respect," and on page 3 thereof it is admitted that "what Congress could do in this par-

ticular, the President has the right to do.” There also appears on the same page an admission that, “Upon none of our claims had there been a discovery of oil or gas on September 27, 1909.” The position of the appellants that the word “location” and the words “claims existing and valid” were used by the President loosely or otherwise than as defined by the law is not sound. The usual rules applicable in construction of statutes apply here. The latter part of the clause in question is that such location and claims existing and valid on the date of the order of withdrawal shall proceed to entry “in the usual manner after *field investigation* and *examination*.” The President did not possess the power under the law to provide that “location” should proceed to entry under the Mining Law after field investigation and examination in cases where there had been no “discovery” on the particular claim in question. Congress had provided that discovery was a part of the location, and must precede entry and patent. The position of appellants necessarily involves the contention that President Taft intended to provide for entry under the Mineral Land Law where there had been no discovery. Obviously, when, in the words of the clause, he authorized persons “to proceed to entry in the usual manner, after field investigation and examination,” he had in mind only those who had reached the stage where they were ready for “field investigation and examination,” and those who had some other “claims existing and valid” under some other

law than the Mineral Land Law. The clause must be given the construction which necessarily follows upon the use of the words in their accepted meaning, in the light of surrounding circumstances, and the land laws with which it must be considered in *pari materia*. The result is that its provisions are restricted in their application to those instances in which persons upon the public lands at the date of the order of withdrawal had vested rights under the law. This being true, appellants are in no position to invoke the provisions of that clause. What the President meant by the language above quoted is attempted to be more fully pointed out in the appellee's main brief heretofore filed.

The President was bound to respect all claims "existing and valid" on the date of the withdrawal order, under whatsoever law such valid and existing claim arose. The word "location" was sufficient, in so far as the Mining Law is concerned, and the words "valid and existing claim" were sufficient in so far as the Homestead and all other land laws under which claimants may have acquired vested rights were concerned. The clause was one of assurance and repose to "locators" under the Mineral Land Law, and "existing and valid claims" under all other laws.

The situation, as it confronted the President, inducing him to make the order of withdrawal, is set forth by the Supreme Court of the United States

in the *Midwest Oil Company* case, 236 U. S., 459, as follows:

“Large areas in California were explored; and petroleum having been found, locations were made, not only by the discoverer, but by others on adjoining land. And as the flow through the well on one lot might exhaust the oil under the adjacent land, the interest of each operator was to extract the oil as soon as possible so as to share what would otherwise be taken by the owners of nearby wells.

The result was that oil was so rapidly extracted that on September 17, 1909, the Director of the Geological Survey made a report to the Secretary of the Interior which, with enclosures, called attention to the fact that, while there was a limited supply of coal on the Pacific Coast and the value of oil as a fuel had been fully demonstrated, yet at the rate at which oil lands in California were being patented by private parties it would ‘be impossible for the people of the United States to continue ownership of oil lands for more than a few months. After that the Government will be obliged to repurchase the very oil that it has practically given away * * *.’ ‘In view of the increasing use of fuel by the American Navy there would appear to be an immediate necessity for assuring the conservation of a proper supply of petroleum for the Government’s own use * * *’ and ‘pending the enactment of adequate legislation on this subject, the filing of claims to oil lands in the State of California should be suspended.’

This recommendation was approved by the Secretary of the Interior. Shortly afterwards he brought the matter to the attention of the President, who, on September 27, 1909, issued the following proclamation:

‘Temporary Petroleum Withdrawal No. 5’ ”—

There is nothing in that situation that at all resembles the alleged conditions attempted to be painted in appellants' brief.

Construction of the Pickett Act.

In all three of the cases appellants invoke the remedial provisions of the so-called Pickett Act. On page 31 of their brief it is stated that "this Act was at least applicable to claims where the possession and discovery were such that courts would have protected the occupants against intruders, the learned Attorney General, himself, concedes." That is the full extent to which the proviso goes. The pertinent part of that Act is as follows:

"Provided that the right of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands, and who at such date is in diligent prosecution of work leading to the discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work."

As has been shown in the briefs of the appellants and of the Government, no person claiming under the Mineral Land Law was prior to June 25, 1910, protected against an order of withdrawal properly made unless there had been a discovery. It is admitted on page 34 of appellants' brief: "As originally framed, the Bill (the Pickett Act), ratified the Taft withdrawal order of September 27, 1909, in express terms." That was substantially all the Bill

did. Congress was pressed to consider the claims of a number of people who were affected by that withdrawal. By amendment the proviso above quoted was inserted. As stated on page 34 of appellants' brief, " It is not open to doubt that it was designed for the express purpose of protecting a certain class of unprotected locators, which it was believed—whether rightly or wrongly is not important—the Taft Withdrawal Order did not protect at all."

This is, no doubt, true, and the interesting question is, what was the situation which Congress intended to meet, and exactly what class of people did Congress intend to protect by the proviso of the Pickett Act.

The situation which appealed to Congress appears on pages 42, etc., of Plaintiff's main brief. The extent to which Congress purposed to go in conferring new rights, as against the Government, in favor of occupants and claimants of these mineral lands, was measured by the extent to which the courts had gone in protecting such occupants and claimants against the forcible and fraudulent intrusion of third persons.

The language of the proviso of the Pickett Act, here under consideration, was borrowed from the case of *Miller vs. Chrisman* (140 Cal., 440; 197 U. S., 313). It is substantially the same language as used by the Court in *McLemore vs. Express Oil Co.* (158

Cal., 559); and *Borgwardt vs. McKittrick* (164 Cal., 650), and in other cases cited in the briefs heretofore filed.

At the top of page 32 of the appellants' brief there is a quotation from a letter from the Attorney General to the Secretary of the Interior, as follows:

“The proviso to the Pickett Act protected this explorer's right from the order of withdrawal to the same extent and upon the same conditions as it was protected by pre-existing law against private intruders.”

It is there stated by the appellants, following this quotation:

“There is, therefore, upon this point no dispute between the Government and ourselves as to the general proposition that any claim *accompanied by possession* and what would be considered due diligence under the pre-existing law is restored and revived by the foregoing provision of the Pickett Bill.”

It is not accurate to say that the rights, as they exist under the proviso of the Pickett Act, were “restored and revived,” inasmuch as the rights there conferred never before existed as against the Government. It is accurate to say that whatever rights were secured by the proviso were *conferred* by it. Similar character of rights had existed in favor of occupants diligently prosecuting work leading to discovery on land claimed under the Mining Laws, but no such right had ever *existed* as against the Government, until conferred by the proviso of the Pickett Act.

With great respect it is submitted that Judge Bledsoe, in the McCutchen case, quoted from, in appellants' brief, erroneously failed to make the distinction between the effect of the Taft Order of Withdrawal and the proviso of the Pickett Act, here sought to be pointed out. The Pickett Act is essentially remedial, and was intended to do nothing more than to confer rights against the Government, and in favor of a certain class of claimants and occupants, similar to those which theretofore had existed under the decisions of the courts in favor of such class of claimants and occupants against third parties. As to all lands upon which a third party could lawfully enter before the order of withdrawal, the withdrawal became effective. Thereafter it attached whenever diligent work or possession by the claimant ceased.

It is admitted by the appellants, in their brief, as follows:

“And we further know it to have been the law, at the date of said order, that the courts would recognize and protect such oil locations or claimants only as were accompanied by *pedis possessio* and due diligence looking to a discovery.” (See top page 6.)

What constituted due diligence which protected the occupant or claimant from intrusion by third persons is discussed in the main brief and elsewhere herein.

The Pickett Act says: “The right of any person * * * shall not be affected or impaired,” etc. Prior

to the withdrawal of the lands in suit, persons had the right to mark the boundaries of mineral claims thereon, and post notices defining the extent of such claims, and, within limits fixed by law, proceed to explore for discovery of minerals. If such discovery had been made before withdrawal of the land from acquisition, a right became vested in the explorer. As, however, the land was withdrawn before discovery, further exploration was unlawful, until the passage of the Pickett Act. The purpose of the proviso of the Act, therefore, was to avoid the application of orders of withdrawal "*theretofore*" or "*thereafter*" made to a certain specified class of claimants.

The "right" to explore for oil and gas, as it existed under the general Mineral Land Law of the United States, up to the time of the withdrawal, was, by the proviso of the Pickett Act, not to be affected or impaired as to occupants or claimants who were (a) bona fide, (b) in diligent prosecution of work, and (c) of a character leading to the discovery of oil or gas, *so long as* (and no longer than) the "said work" shall be prosecuted diligently and continuously.

This Court has already in mind the definition of what is the diligent prosecution of work leading to the discovery of oil. The distinction is found in *Miller vs. Chrisman* (*Supra*); *Borgwardt vs. McKittrick Oil Co.* (130 Pac. 417); *Crossman vs. Pendry* (8 Fed. 693); *Thallman vs. Thomas* (111 Fed. 277),

and other cases cited in the briefs. It will be observed from these cases, and by the admissions in brief, that it involved not only diligence and continuity, but *pedis possessio*.

GROUP DEVELOPMENT OF MORE THAN ONE CLAIM; AND PROGRESSIVE AND SUCCESSIVE DEVELOPMENT OF ONE CLAIM AFTER ANOTHER.

The position of the appellants that the order of withdrawal of September 27, 1909, relieved them of the necessity of doing work to the extent of the character, and at the place required for their protection by the laws of the United States before the order of withdrawal, is not well taken. Such was the view taken by those who urged for their protection the insertion of the proviso of the Pickett Act (pages 43 to 45, Appellee's brief); and it was what Congress meant when it said that the Act shall not "be construed as a recognition, abridgement, or enlargement of any asserted rights or claims initiated upon any oil or gas-bearing lands after any withdrawal * * * made prior to the passage of the Act."

As the Supreme Court said in the *Midwest Oil Co.* case (*Supra*): "in other words, if, notwithstanding the withdrawal, and the locator had initiated a right which, however, had not been perfected, Congress did not undertake to take away such right." That

Court further said: "If a location made after the withdrawal gave the appellees no right, Congress, by this statute, did not legislate against the public and validate what was then an invalid location." (236 U. S., p. 2.) In view of these considerations it is submitted that appellants' claim of title in No. 2787 and No. 2788 to several tracts, upon the ground that they were drilling a well on another tract not in suit, has no foundation in law. The progressive drilling on one quarter section, and thereafter on another, is not the kind of work contemplated by the statute as leading to the discovery of oil or gas on each quarter claimed. If discovery of oil on a particular quarter section cannot be said to be discovery on one or more additional quarters, the drilling on a particular quarter section cannot be said to constitute work leading to the discovery of oil or gas on one or more additional quarters. Whether the lands in suit would be drilled, by the appellants, clearly depended upon the contingency of finding of oil on another quarter not involved in suit. This is shown by the terms of the lease under which the drilling was carried on. Furthermore, this contention of appellants that any number of mining claims may be acquired on account of work done on one of them, violates the policy of the Mineral Land Law against monopoly. Such was not the law prior to the order of President Taft withdrawing from acquisition the petroleum lands or prior to the Pickett Act. A change, such as is contended for, would not tend to the conservation of petroleum, but otherwise, towards monopoly of large corporations.

The reasoning of Judge Ross, in the case *Gird vs. California Oil Co.* (60 Fed., 531), is particularly pertinent here:

“These 80 locations, the plaintiffs contend, constitute a consolidated claim, the working of which could be best done by one agency and pursuant to one general system, the expenditures in pursuance of which could be legally and properly proportionately applied to the respective claims included within the so-called consolidated claim. If this can be legally done, it is quite manifest that 80 locations, embracing more than 8,000 acres of land, would not necessarily constitute the limit, but that the system may as well embrace every claim within the district, and thus an entire district be acquired by one agency pursuing a general system of development of the whole, and making annual expenditures equal in amount to the aggregate required by law to be made or performed upon the separate and independent locations. It is endeavored to sustain this position upon the theory that, as it is the policy of the law to encourage the greatest and most economical development of the mineral lands, it encourages such consolidation of ownership and operation of claims ‘where all the mineral can be extracted from a large body of land more economically under one ownership, one system of management, one combined operation, than by the diverse and antagonistic operations of many claims.’ And a great deal of testimony and other evidence was introduced to show that the nature of petroleum and the geological structure of the country comprising the Little Sespe petroleum mining district, and the effective drainage power of an oil well, are such that all of the locations can not only be best worked by one system, but that it is almost necessary that they should be

so worked. * * * But, as the normal condition of petroleum is one of repose, and not of motion, and it belongs to the rock in which it is embedded, it would seem to be very clear that the only difficulty in the way of preventing the recovery by the owner of the oil so abstracted would be the difficulty of making the necessary proof."

After referring to the theory of economy of group and progressive development section by section, Judge Ross proceeds:

"And such, the proof shows, was the plan of operations adopted by the lessees of the plaintiffs, in the pursuance of which they have expended annually more than \$8,000, and in the aggregate more than \$300,000. All of this, no doubt, greatly conduces to the profits of the plaintiff's lessees, and is very convenient. But I am unable to see that these facts at all answer the requirements of the law regarding the location and acquisition of placer mining ground, which is the same whether the mineral it contains be gold, silver, quicksilver, petroleum, or anything else, or the applicant for the government title be rich and able to conduct operations on a large scale, or poor and able only to make the annual expenditure of \$100 in work or improvements."

In this connection, attention is called to the discussion in the main brief of the appellee, and to the letter of the Attorney General to the Secretary of the Interior, with reference to the decision of the Commissioner of the General Land Office, in the Honolulu case. The letter referred to is a part of a public document, printed as the hearings before

the Public Land Committee of the Senate. Three copies of that document were supplied, by permission of the Court, at the time of the oral argument.

Furthermore, as has heretofore been pointed out, if the occupancy or claim of a person was not such as, under the decisions of the courts, would protect the occupant against intrusion by third persons, it is not such as will, under the terms of the Pickett Act, protect the claimant against the withdrawal of the land by the Government.

The Pickett Act With Special Reference to Numbers 2787 and 2788.

In numbers 2787 and 2788 it is not even contended that work of any character whatever was in progress at the date of the withdrawal. All that appellants contend is that "drilling was actually proceeding on the adjoining claim" (top of page 23 of appellants' brief); and that "the sinking of the one well * * * is 'work leading to discovery of oil or gas' on every claim within the group" (bottom of page 40 of their brief).

It is urged that the Act is very broad in its scope, insomuch that it removes from the effect of the withdrawal not only the particular parcel of land included within the boundaries of a given claim upon which drilling was in progress, but also all other lands claimed, whether in the actual posses-

sion of the claimant or not, and even though no work whatever was in progress thereon at the date of the withdrawal. This contention has already been replied to herein. Of course, if this contention is sound, the actual possession of twenty acres coupled with the act of drilling a well thereon would enable the person so possessed and so drilling to hold not only one or two other claims, but one hundred or two hundred or even a thousand quarter-sections, notwithstanding the fact that he neither had actual possession of nor was doing any work upon any of them. The exigencies of the instant cases have required appellants to lay down on page 40 of their brief in Nos. 2787 and 2788 the proposition that "the sinking of the one well * * * is 'work leading to discovery of oil or gas' on every claim within the group"—that is, three others. If on three others, why not on three hundred? What, then, would become of the spirit of the public land laws against monopoly?

To sustain their position, appellants are driven to the extreme of asking this Court to hold that the Act was passed without thought or consideration, indeed in subversion, of existing statutes and long maintained principles. If the standard of diligence required by the Act is not referable to each parcel of land, then by the same token, since the idea of location is thereby impliedly destroyed, a discovery on one parcel would be good by implication as a discovery on the entire list of lands; the marking of the boundaries of each claim, which

normally follows discovery, would be by implication unnecessary; and development work amounting to \$500.00 on each location would be by implication avoided—indeed, the entire form and structure of the pertinent mineral land laws would be destroyed by the same process of implication, a sound public policy enunciated by Congress half a century ago and effectuated by the Courts, Federal and State, in countless decisions, ruthlessly set at naught and the doors swung wide open to fraud and monopoly. No remedial statute ought to be so violently construed as to lead to such results.

The argument of appellants at the bottom of page 39 and on page 40 of their brief in Nos. 2787 and 2788 can lead nowhere short of the conclusion that, since the Act did not use the word location, it impliedly repealed all provisions of existing law governing mineral locations. If the Act protects “the whole tract of oil bearing lands so claimed,” the only showing which a claimant would have to make would be that he was drilling a well at one point with the intention of subsequently developing a “whole tract of oil bearing lands” consisting of an absolutely unlimited number of sections; or, for that matter, he need not claim by sections or quarter-sections, but by wholesale he could make good his claim to an entire oil field.

The decision of the Commissioner of the General Land Office in the Honolulu case is referred to in the brief of opposing counsel. The position of the

Government with respect to that case is stated in the letter of the Attorney General heretofore referred to. Even in that case the Commissioner said:

“It does not follow from the above, however, that a mere progressive development of a series of claims one after another, where the claims of the series last developed are not directly and necessarily dependent on the proper development of other claims in the group, would constitute diligence within the meaning of the Act so as to off-set the effect of an intervening withdrawal.”

What the record in Nos. 2787 and 2788 discloses is “a mere progressive development”; and the Commissioner has sufficiently negatived the idea that the principles upon which a favorable determination was reached by him in the Honolulu case would be applicable here.

Certain Controlling Facts in No. 2789.

Certain general statements concerning the facts in No. 2789 were made on the oral argument and are contained in the brief of appellants. An ascertainment of the concrete, specific facts disclosed by the record will be not only profitable but determinative of this case. Appellants' position is that they had, prior to the withdrawal, done everything preparatory and necessary to beginning drilling operations except secure the requisite supply of water. “It was owing to the utter impossibility of getting sufficient water that the work of drilling was not started”

(R. 60). "That the said corporation was ready, able and anxious to proceed with the drilling of wells upon each of the four quarter-sections, and would have begun the drilling thereon immediately after the said 21st day of June, 1909, but for the said difficulty with water" (R. top 63).

The affidavit of M. J. Laymance, offered by appellants, shows that "actual drilling commenced on April 28, 1910" (R. 64).

Simultaneous drilling on the four quarters was said to be impossible because the supply of water was limited to "an amount adequate to drill but one well at a time"—according to the record (p. 65). At this point it becomes pertinent to ascertain just *what drilling was done after April 28, 1910*. One looks in vain to the affidavits offered by appellants for information at this point. They offer nothing whatever to this end except the general statement of M. J. Laymance that, while he "was interested in said property drilling operations were continued with all possible diligence," etc. (R. top page 66). It does not even appear when he ceased to be "interested in said property."

Over against this general statement of Laymance there is the affidavit of S. G. Tryon, offered by the Government, which gives certain specific and particular facts concerning these drilling operations. These facts furnish a complete refutation of appellants' claim that, once they got water, they dili-

gently drilled. At the top of page 53 of the Record he states that he was in charge of the work on the lands in question from March 15, 1910, to March 1, 1911.

At the top of page 53 Tryon deposes that drilling began on the southeast quarter between April 15, 1910, and May 28, 1910—appellants' witness Laymance, at the middle of page 64, states that "actual drilling commenced on April 28, 1910"—and continued until May 28, 1910, when a depth of 460 feet was reached.

On pages 53 and 54 Tryon states that drilling on the southwest quarter began June 20, 1910, and continued until July 17, 1910; that no drilling was done thereafter until it was resumed October 9, 1910, whereafter it was continued until October 12, 1910; and that no further drilling was done until after March 1, 1911, when he ceased to have charge of the work.

On page 54 Tryon states that drilling on the northwest quarter began July 25, 1910, and continued until August 22, 1910, when a depth of 620 feet was reached; and that no further drilling was done until after March 1, 1911, when he ceased to have charge of the work.

On page 55 he states that drilling on the northeast quarter began September 5, 1910, and continued until September 22, 1910, at which time a depth of 586 feet had been reached; and that no

further drilling was done until after March 1, 1911, when he ceased to have charge of the work.

Furthermore, Tryon states unequivocally at the bottom of page 65 that no discovery of oil or gas was made on any of the four quarters between March 15, 1910, and March 1, 1911.

Thus it appears, with reference to the southeast quarter, that drilling ended May 28, 1910, and was not resumed, if at all, until at some unknown time after March 1, 1911.

With reference to the southwest quarter it thus appears that drilling ended October 12, 1910, and was not resumed, if at all, until at some unknown time after March 1, 1911.

With reference to the northwest quarter, it thus appears that drilling ended August 22, 1910, and was not resumed, if at all, until at some unknown time after March 1, 1911.

With reference to the northeast quarter, it thus appears that drilling ended September 22, 1910, and was not resumed, if at all, until at some unknown time after March 1, 1911.

It is disclosed that as late as July, 1913, when the North American Oil Consolidated acquired and entered into the possession of these lands, there were only three completed wells, and this fact is found in the affidavit of Louis Titus offered by Appellants

(R. 77). Thus it is shown that one of the four wells begun in 1910 had not been completed in 1913.

It is to be observed that this evidence of drilling dates, while it was offered by the Government, is uncontradicted. From it it is apparent that, in the case of the southeast quarter, there was an interval of at least 9 months during which no drilling was done, although a supply of water adequate for drilling one well at a time had been secured April 28, 1910; that, in the case of the northwest quarter, there was an interval of at least 4 months and 18 days during which no drilling was done, although a supply of water adequate for drilling one well at a time had been secured April 28, 1910; that, in the case of the northeast quarter, there was an interval of at least five months, during which no drilling was done, although a supply of water adequate for drilling one well at a time had been secured April 28, 1910; and that no drilling whatever was done anywhere on the entire section between October 12, 1910, and March 1, 1911. Thus, by the uncontradicted evidence of the record, it is shown that for four months and 18 days appellants ceased drilling, although the only excuse that they urged for failure to begin drilling prior to April 28, 1910, was at that time removed.

If the construction of the Pickett Act for which appellants contend were sound, which it is not, namely, that it requires diligence only at the date of withdrawal and thereafter only after the date of

its passage, and that it condones failure of diligence during the interval between the withdrawal and its passage, it would nevertheless remain that if the Act requires continuation after its passage on June 25, 1910, and until discovery, the appellants have no rights. There was according to this record an interval of four months and 18 days after June 25, 1910, during which no work whatever was done nor excuse nor reason for failure even attempted. The Act offers refuge to the bona fide claimant or occupant only "so long as he shall continue in the diligent prosecution of said work." No matter how diligent appellants may have been from June 25, 1910, to October 12, 1910. They ceased their claimed diligence in October, 1910, and did not resume it until some undisclosed and unknown time after March 1, 1911. They took themselves from without the remedial provisions of the Act, and the withdrawal became operative to defeat their alleged "rights."

Appellants differ with the Government as to whether the diligence prescribed must have covered the period between the withdrawal and the passage of the Act; but they admit that there must have been diligence "at the date" of the withdrawal, and that there must have been a continuation of diligence after the passage of the Act; therefore, what is the correct construction of the Act as to diligence between the date of the withdrawal and the passage of the Act is, in the light of the evidence

of the drilling operations immediately above recited, merely academic as to No. 2789.

The Act Does Not Condone a Cessation of Work in the Interval Between the Withdrawal and the Date of Its Passage.

It is submitted that diligence during the interval between the date of the withdrawal and the passage of the Act is as much a requirement of the Act as diligence at the date of the withdrawal. The very wording of the Act must lead to this conclusion. The Act was addressed not particularly to the Taft withdrawal, but to "any order of withdrawal heretofore or hereafter made"; and not only required diligence "at the date of" any withdrawal, but provided that the right which it extended should "not be affected or impaired" *so long as there was a continuation* of "diligent prosecution of said work." The word "said" clearly relates the diligence as to which there must be a continuation to the diligence required "at the date of" the withdrawal. The suggestion that such a construction penalizes those who were diligent at the date of the Taft withdrawal, but ceased work thereupon out of respect to the order, while it rewards those who violated the order by continuing to work, is without force. Those who secured the passage of the Act sought favor for themselves and in the form which would be effective in their cases. At the date of the withdrawal they were in positions in which they represented that they could not cease work and this, not a lack

of respect, was put forward as reason for not stopping—this and their opinion that the order was invalid. That Congress responded in terms intended to aid them so representing their wants and failed to provide a remedy for others is not reason for giving the Act a construction which would do violence to its words and structure. The contention of appellants has no basis upon which to stand and their argument is merely *ab convenienti*. If Congress intended to do what appellants contend it intended to do, it would not have required a continuation of work, because that would not have met the exigencies of cases like those of appellants—they could not *continue* that which they were *not doing* at the time of the Act. If Congress had intended to include such cases, it would have exacted first a resumption of work and thereafter a continuation and would have employed language clearly conveying such a meaning.

The Water Question.

Appellants seek to differentiate the facts in No. 2789 from those in *United States vs. Midway Northern Oil Co.*, 232 Federal 619, 626. They do not challenge the soundness of Judge Bean's opinion, but say that theirs was no "mere effort to obtain water"; that they were at the date of the withdrawal "actually engaged in the prosecution of work necessary to the proposed drilling operations." What was the work in which they were "actually en-

gaged"? Clearing brush and leveling ground (R. p. 63). However, in another breath and immediately before making the above statement concerning clearing brush the same witness says at the top of page 63 of the record that they "would have begun the drilling thereon immediately after the said 21st day of June, 1909, but for the said difficulty with water." If clearing brush and leveling ground was necessary to drilling and was in progress September 27, 1909, how could they have begun drilling immediately after June 21, 1909? It must be apparent that the work of clearing and leveling is a mere specious excuse upon which to base a statement of diligence at the date of the withdrawal. The whole case of appellants is made by them to rest upon diligence predicated upon effort to get water. The record is writ large with protestation of readiness to drill if water had not been lacking. The absence of water is their excuse for failure to drill. They say they were ready if they had water; and effort, "mere effort"—they show nothing more—is set up as an excuse for failure to drill; for they say that they had done everything except get water. They were merely waiting for water; and they were also waiting to try out the region by wells on some lands before they determined to drill on the lands sued for.

It is difficult to conceive how this case can be distinguished from the Midway Northern case. No matter how diligent they may have been prior to September 27, 1909, it cannot be imputed to them

for diligence which was wanting on the crucial date and subsequently. It is said that on that date they were ready to drill, but were not drilling for want of water which they were making "mere effort" to get. If in the Midway Northern case there was nothing but effort to get water, appellants are in no better plight. So far as *work* is concerned, any diligence which they may have exercised had ceased on September 27, 1909, and on that day and thereafter for many days they were merely waiting to get water and test the field elsewhere. In the Midway Northern and in this case the excuse is the same—lack of water. It can make no difference how much or how little actual work had been done, if it had ceased. In neither case was there, on the date of the withdrawal, anything being done to get water, except possibly some effort to buy it. Judge Bean has decided that this is not sufficient; that "the question is not whether the defendants were able to prosecute the work of discovery at the date of the withdrawal order, but whether they were actually engaged in such work at that time."

One observation applicable to all of the cases: If the conditions by which appellants were surrounded at the date of the withdrawal were such as would have afforded them protection against intruders, all that it is necessary for one claiming public mineral lands in an arid region to do is to take possession, build a camp and a derrick—nothing more—and resist the effort of one who has hauled his water or otherwise gotten it, and would

enter and actually drill, on the plea that he is waiting to get water. If he could do this for a month or six months, why could he not do so indefinitely—why could he not rely upon this defense until the water was actually brought to the land by the enterprise of others? To use the farmer as an illustration: would he be regarded as diligently preparing for a harvest while, after having done everything requisite to pitching his crop, he sits by and waits for others to project and perfect a scheme of irrigation?

Questions of Fact in This Case Are Not for the Land Department, and It Has Not Passed on the Facts.

The position of appellants, stated on pages 27 to 31 of their brief, is untenable. They assert the application for patent, and the issuance of a receipt, which they erroneously call a final certificate, gives to them a complete, equitable title, and that the Land Department, alone, can try the facts. In the cases of *U. S. vs. Devil's Den etc. Co.*, and *U. S. vs. Lost Hills etc. Co.*, the facts as to this phase were substantially similar to those in the cases at bar. This identical contention was made, and was decided adversely to appellants' present contentions.

The opinion of Judge Bean is an all sufficient answer. We set forth pertinent parts of it as Appendix A hereto. It should be called to the atten-

tion of this Court that since the oral argument the evidence has been presented to the District Court on final hearing in No. 2789.

In the brief of the appellants reference is made to a decision by United States District Judge Riner, in the case of *The United States vs. Ohio Oil Co., et al.*, and the Court is informed in the brief of appellants that the case has been affirmed by the Circuit Court of Appeals. The appellants expressed the expectation that the opinion of the Circuit Court of Appeals of the Eighth Circuit would sustain the contentions made by them. Since the oral argument, a copy of that opinion has been received, and will be furnished to the Clerk for the convenience of this Court. It will appear, from a perusal thereof, that no principle of law is there laid down which is at variance with the decisions of the District Judges in California who have recently decided oil cases pending here.

Respectfully submitted,

F. P. HOBGOOD, JR.,

FRANK HALL, and

E. J. JUSTICE,

Attorneys for Appellee.

APPENDIX "A"

*In the District Court of the United States for the
Southern District of California,
Northern Division.*

HON. ROBERT S. BEAN, Judge Presiding.

UNITED STATES OF AMERICA,

Plaintiff, (Three cases)

VS.

Nos. A-37

DEVIL'S DEN CONSOLIDATED OIL COM-
PANY, LOST HILLS MINING COM-
PANY, and LOST HILLS MINING
COMPANY,

A-52

A-57

respectively

In Equity.

Defendants.

OPINION.

APPEARANCES:

For Plaintiff:

E. J. Justice, Special Assistant to the Attorney
General;

Frank Hall, Special Assistant to the Attorney
General.

For Defendants:

Joseph D. Redding, Esq., Earl G. Pier, Esq.;

Edmund Tauszky, Esq., and Peter F. Dunne,
Esq.

Extracts From Judge Bean's Opinion.

* * * * *

The broad question then is whether the mere acceptance by the Land Office of an application for a patent to a mining claim in due form from a private individual, and the payment by the latter of the purchase money after the required notice has been given, is a bar during the pendency thereof in the Land Department to a suit by the Government to cancel and annul the interest of the application, if any, and determine his right to possession and to extract and market the mineral, on the ground that the application for patent and the proceedings connected therewith were and are fraudulent, wrongful and unlawful.

In my judgment it is not. The proceedings are wholly *ex parte* as to the Government and can have no greater effect than if the patent had actually issued, and it is settled law that the issuance of a patent under such circumstances is not a bar to a suit by the Government to vacate or annul such patent if fraudulently and unlawfully obtained, or issued by mistake or inadvertence of the officers of the Land Office. (*Hughes vs. United States*, 4 Wallace 232; *Germain Iron Co. vs. United States*, 165 U. S. 379; *Washington Securities Co. vs. United States*, 234 U. S. 76; *Linn & Lane Timber Co. vs. United States*, 236 U. S. 574.) I do not think any greater virtue should be accorded to a mere *ex parte* preliminary proceeding. It is insisted, however,

that as the applications for patent are now pending and undetermined in the Land Department, the Court will not assume jurisdiction even if such applications are fraudulent and unlawful, until they are finally disposed of by the Department. The Land Department is vested conformably to the Acts of Congress, with the exclusive jurisdiction to determine the rights of claimants to public lands, and until it has exhausted its jurisdiction by the issuance of a patent, a Court will not assume to determine which of two rival claimants is entitled to the property (*Johnson vs. Towsley*, 13 Wall. 72; *Marquez vs. Frisbie*, 101 U. S. 473). But the Government is not an adverse party to a proceeding to acquire title to its property, nor is the Land Department a tribunal to which it must submit its rights or litigate with one who has taken possession of its property or has attempted to acquire title thereto. The notice required by statute of an application for patent to a mining claim is designed and intended to cut off the rights of private claimants and not the Government of the United States. It is given in order that all persons having adverse claims may be heard in opposition to the issuance of the patent. But (Sec. 2325) "If no adverse claim shall have been filed it shall be presumed that no adverse claim exists, and thereafter, no objection from third persons to the issuance of patent shall be heard except it be determined that the applicant has failed to comply with the terms of this chapter." Sec. 2325 R. S. If, however, no adverse claim is filed during the period of publication, the adverse

claimant is required by section 2326 to commence within 30 days thereafter proceedings in a court of competent jurisdiction to determine the same, thus clearly showing that the purpose of the statute is to make the proceedings binding on private parties and not the Government. There is no reason to be found in the relation of the Government to such proceeding which will deprive it of the same right to relief if the proceedings are fraudulent or unlawful as an individual would have in regard to his own contract procured under similar circumstances. Indeed, there are reasons why it should not be denied the right to invoke the right of a court by the mere receipt and acceptance of an application for a patent and the purchase price by an officer of the local Land Office, for, as said by Mr. Justice Miller in *United States vs. Miner* (*Supra*): "In nine cases out of ten, perhaps in a much larger percentage, the proceedings are wholly *ex parte*. In the absence of any contesting claimant for a right to purchase or secure the land, the party applying has it all his own way. He makes his own purchase, sworn to before those officers, and he produces affidavits. If these affidavits meet the requirements of the law, the claimant succeeds, and what is required is so well known that it is generally reduced to a formula. It is not possible for the officers of the Government, except in a few rare instances, to know anything of the truth or falsehood of these statements. In the cases where there is no contesting claimant there is no adversary proceedings whatever. The United States is passive; it opposes no

resistance to the establishment of the claim, and makes no issue on the statement of the claimant. When, therefore, he succeeds by misrepresentations, by fraudulent practices, aided by perjury, there would seem to be more reason why the United States, as the owner of the land of which it has been defrauded by these means, should have remedy against that fraud—all the remedy which the courts can give—than in the case of a private owner of a few acres of land on whom a like fraud has been practiced.”

I am of opinion, therefore, that the Court has jurisdiction to try the questions involved in these cases. If, however, I am mistaken as to the extent of the jurisdiction, the Government is clearly entitled upon the allegations of the bill and the showing made to invoke the aid of a court of equity to protect the property from waste and destruction pending the final determination of its rights therein in the Land Department out of the court. (*Northern Lumber Company vs. Ryan*, 124 Fed. 819; *El Doro Oil Company vs. United States*, 229 Federal 246.)

Even where land has ceased to be public lands by pre-emption, homestead and like claims but to which claimant has not perfected his title, they are still so far public lands of the United States that the Government may protect them from waste. (*Shiver vs. United States*, 159 U. S. 491.)

The Land Department has no general equitable power. It cannot grant injunctions, appoint receivers, nor, by its orders or decrees prevent trespass upon or protect the public domain from spoliation. It is true under the Act of Congress of August 25, 1914, the Secretary of the Interior is authorized in his discretion to enter into agreements with a certain class of applicants for patents for oil and gas lands included within an order of withdrawal, relative to the disposition of oil or gas produced therefrom. This is a discretionary power probably intended for the benefit and to protect from liability these trespassers, those who in the judgment of the Secretary have mistakenly trespassed upon land not open to entry and in good faith expended money in prospecting for oil and in the development and the improvement of the property. In one of the cases now under consideration an application for such a contract has been made and denied by the Secretary on the ground and for the reason that suit was then pending in this court. His reasons for refusing to enter into the contract are not the subject of review here. It is enough that no such contract has been made.

* * * * *

IS THE DOCTRINE OF "GROUP DEVELOPMENT"
APPLICABLE TO THE PICKETT ACT?

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT

CONSOLIDATED MUTUAL OIL COMPANY,
a Corporation, and J. M. McLEOD,
vs. Appellants, } No. 2787.
THE UNITED STATES OF AMERICA, }
Appellee.

CONSOLIDATED MUTUAL OIL COMPANY,
a Corporation, and J. M. McLEOD,
vs. Appellants, } No. 2788.
THE UNITED STATES OF AMERICA, }
Appellee.

BRIEF IN BEHALF OF APPELLANTS.

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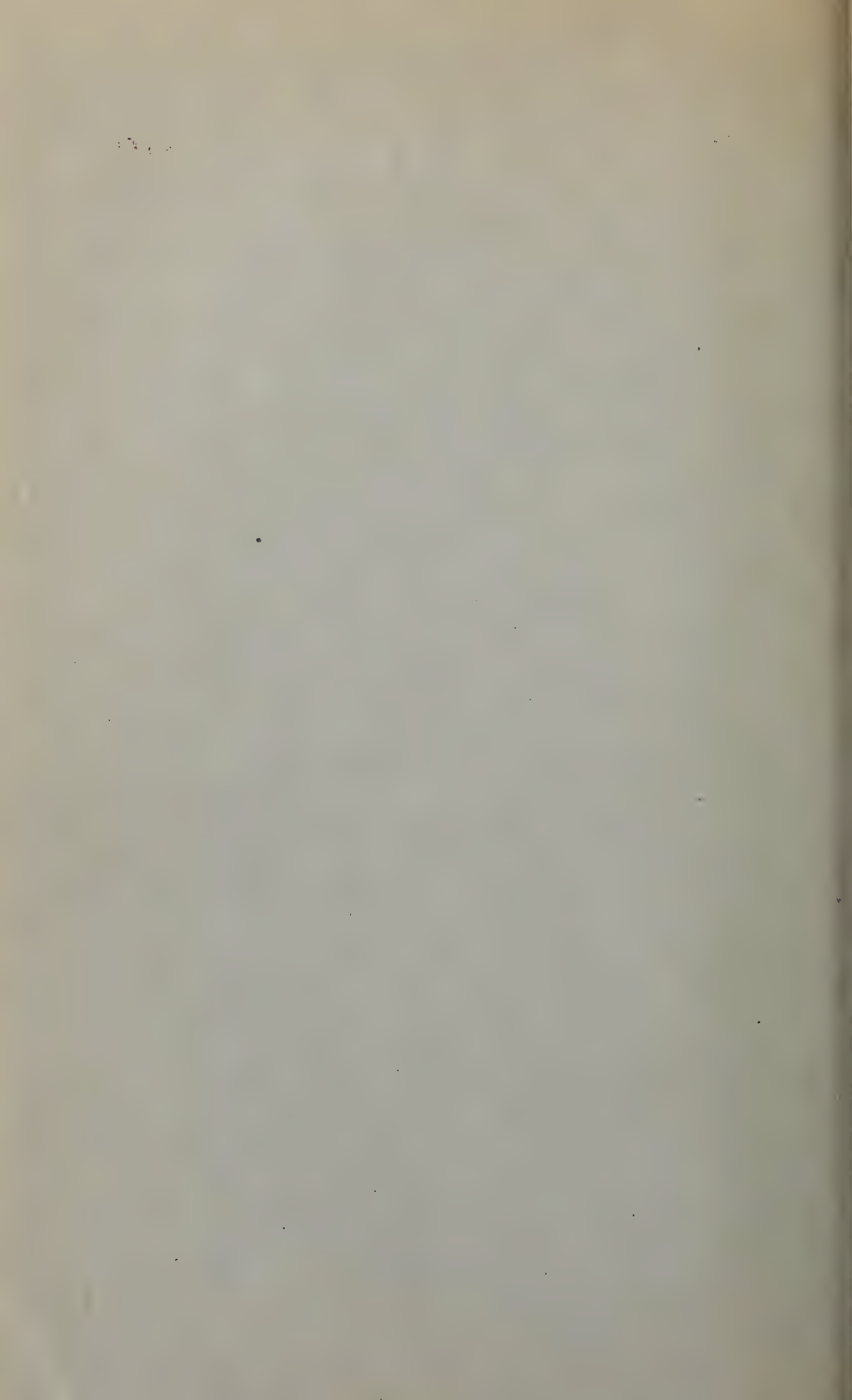
FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

The James H. Barry Co.,
San Francisco

NOV 14 1916

F. D. Monckton,
Clerk.



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BRIEF IN BEHALF OF APPELLANTS.

If it can be shown that the universally recognized rule of group development is applicable in determining the question of diligent work under the Pickett Bill, then we take it that it must be conceded that the admitted facts fully bring this case within the rule.

The four quarters of Section 28 were held in common ownership and are contiguous. In June, 1909, the plan was formulated of working them as

a unit. Pursuant to this plan, a camp were erected about the common corner of the four claims. Bunk houses were constructed on the Northwest Quarter and Northeast Quarter, a cook house on the Northeast Quarter, a water tank on the Northeast Quarter and stabling facilities on the Southeast Quarter. A pipe line for water was run about five miles from the Stratton Water Company across the Southeast Quarter to the tank on the Northeast Quarter and thence distributed to all the claims. A complete standard drilling rig was erected on the Southwest Quarter near the common corner of the four claims, and derricks constructed on the other three.

Not later than August, 1909, and continuously thenceforward, all four claims were actually occupied by the workmen of defendant and the well on the Southwest Quarter was being actually drilled. On the Southwest Quarter, admittedly the work was proceeding with all possible diligence, on the date of withdrawal and until discovery. The other quarters were developed successively until oil was commercially produced within their respective boundaries.

From the relative position of the well on the Southwest Quarter to the common corner of the four quarters, a discovery of oil therein *demonstrated* to almost a mathematical certainty the existence of an oil-bearing sand on at least a part of each of the other quarters. Indeed, there is a strong probability that any oil pro-

duced in this well would be drawn from an area radiating into all the four quarters of the section.

Besides demonstrating the existence of oil on the other quarters, the drilling well tended to facilitate its extraction. It is a matter of common knowledge that the greatest as well as the most expensive and most dangerous problem of the oil operator drilling in new territory is to discover the relation of the oil-bearing to the water-bearing formations. A failure to know this very materially extends the time of drilling, increases the cost, and makes imminent irreparable injury to the entire field by infiltration of water into the oil sands. The logs of the first wells furnish this information so that subsequent wells may be normally drilled not only in less time and at a less cost, but with little or no danger from water conditions which so often prove fatal to the initial well.

In view of these facts, we earnestly contend that the drilling on the Southwest Quarter coupled with construction of the joint camp, and the actual occupancy of all four quarters, was sufficient if carried on diligently and continuously, and if followed by a discovery on the other quarters, to protect defendants against the withdrawal.

We do not contend that a discovery on the Southwest Quarter perfected the other locations, or permitted the cessation of work on the group. We do contend that work anywhere on the group, demon-

strating the existence of oil on all four quarters and tending to facilitate its extraction was sufficient so long as it was diligently and continuously carried forward to a separate discovery on each claim.

THE LAW OF GROUP DEVELOPMENT.

There are three statutes referring to the amount of work to be done by a mineral claimant.

- (a) Section 2324 of the Revised Statutes referring to annual assessment work.
- (b) Section 2325 of the Revised Statutes requiring the expenditure of Five Hundred Dollars as prerequisite to a patent.
- (c) The provisions of the Pickett Act relating to diligent and continuous work on lands in the withdrawn area.

The first of these statutes applies only between adverse claimants; the second and third apply only between claimants and the Government. The first and second are operative only after a discovery; the third only before discovery.

Now, the purposes of these statutes are different, and the *quantity* of work required varies in each, but there is no difference in the *kind* or *character* of the work required. The statutes make no distinction as to the *kind* of work, the decisions make no distinction, reason makes no distinction.

Work on a mining claim is either a mere pretense, or it is legitimate and *bona fide*. The latter is what the law requires in all cases, whether it be as against an adverse claimant, or for a patent, or against the effect of a withdrawal.

There can only be one sort of legitimate *bona fide* work on a mining claim, and that is work which is designed to demonstrate the existence of the mineral, and then facilitate its extraction. Every one of the decisions, however it may be phrased, resolves itself to this.

It is therefore obvious that work of the same kind and character—though not necessarily of the same amount or cost—which would be legally sufficient to constitute annual assessment work and which if carried to the extent of five hundred dollars, would be sufficient to entitle the claimant to a patent, will also, if carried on diligently and continuously, protect the land against a withdrawal.

What, then, is the kind of work required by Sections 2324 and 2325 of the Revised Statutes? May it be work done on one of a group of claims? For if it appears that group development work or work outside the limits of a claim satisfies the requirements of Sections 2324 and 2325 of the Revised Statutes, then such work also satisfies the requirements of the Pickett Bill.

It is clearly established that annual assessment work may be done on one of a group of claims:

Mt. Diablo Mill & Mining Co. vs. Callison,
17 Fed. Cases, 918.

“Work done outside of the claim, or outside of any claim, if done for the purpose and as a means of prospecting or developing the claim, as in the case of tunnels, drifts, etc., is as available for holding the claims as if done within the boundaries of the claim itself. One general system may be formed well adapted and intended to work several contiguous claims or lodes, and when such is the case, work in furtherance of the system is work on the claims intended to be developed by it.”

Jupiter Mining Co. vs. Bodie, 11 Fed., 666.

By Sawyer, J., instructing the jury:

(Page 682) “Work done outside the claims, or outside of any claim, if done for the purpose, and as a means of prospecting or working the claim is as available for holding the claim as if done within the boundaries of the claim itself.”

Approved and quoted by Judge Hawley in *Book vs. Jupiter Mining Co.*, 58 Fed., p. 117.

Justice Mining Co. vs. Barclay, 82 Fed., 554.

(Page 560) Assessment work “may be done upon other claims or upon other ground, where, as here, it is in reasonable proximity to it, and if the work as done would be beneficial and tend to

the future development or improvement of the claims, it is sufficient."

Anvil Hydraulic Co. vs. Code, 182 Fed., 205.

"Where several claims are held in common, the annual assessment work for all may be done on one of the claims, or upon adjacent patented land, or even upon public land, provided that the claims are contiguous, and that the work is for the benefit of all of them, and tends to develop them all and to facilitate the extraction of ore therefrom."

An instruction to the jury as follows was approved, defining the words "work of benefit or value" as "work" which tends either to enhance the value of the claim in dollars and cents or which is of use in prospecting and developing or operating the claim as a mining claim.

In

St. Louis Mining Co. vs. Kemp, 104 U. S., 636,

Mr. Justice Field used substantially the same language as was used by Judge Gilbert in the *Anvil Hydraulic* case.

See also

Doherty vs. Morris, 28 Pac. (Colo.), 85;

Sexton vs. Washington, 104 Pac. (Wash.), 614.

Section 2324 of the Revised Statutes concerns only adverse claimants and by its terms permits group development. It is therefore important to note that the very same principles are applied in construing

Section 2325, which concerns the rights of the operator as against the Government and which not only makes no mention of group development, but requires that the work be done "upon the claim."

The question is very fully discussed in

Copper Glance Lode, 29 L. D., 542.

The case involved the character of work necessary in order to get patent. The cases on annual assessment work were reviewed at great length, and then Secretary Hitchcock said:

"Manifestly, however, in determining the character and the purpose of labor and improvements had upon a mining claim with respect to their use in the development of the claim or in the development of several claims held in common, the same principle must apply whether the labor was performed or the improvements were made in satisfaction of the requirement of said Section 2324 for the maintenance of the possessory title or in fulfillment of the condition to obtaining the paramount title prescribed by Section 2325 of the Revised Statutes.

"While in the one case the annual expenditure in labor or improvements goes only to the right of possession, and is a matter between rival or adverse claimants, the determination of which is committed to the courts, and in this respect is essentially different from the expenditure of five hundred dollars in labor or improvements required in the other case as a condition to obtaining patent, which is a matter between the applicant for patent and the Government, the determination of which belongs to the Land Department, yet in determining

whether labor and improvements had upon a mining claim or upon several claims held in common are of such a character and are so situated as that they may be properly used in the development of the claim or claims in common, and were so intended, the same principle must necessarily govern in either case."

Secretary Hitchcock then laid down the following requirements for work done on several claims:

1. It must facilitate the extraction of minerals from the claims held in common, though outside of all of them.
2. The claims must be adjoining or contiguous.
3. Such expenditure must have been intended to aid in the development of all the claims.

This doctrine was approved in *Zepher and Other Lode Claims*, 31 L. D., 510. In

Kirk vs. Clark, 17 L. D., 190,

it was held that shallow shafts which were not of any use in the ultimate prosecution of work, but by which the pitch or incline of the bedrock could with reasonable certainty be ascertained, and data furnished on which to base an intelligent estimate of the proper depth at which to begin working a tunnel, were sufficient.

Kirk vs. Clark was approved in *C. K. McCormick*, 40 L. D., page 502, which further held that a drill hole upon a claim for the purpose of prospecting it

in order to secure data upon which further development could be based was sufficient, and in the case involving the Tintic Lode Claims, which has not been reported, a decision of the Land Office was to the effect that the diamond drill holes on an adjoining claim for the purpose of prospecting it were sufficient under the group development theory. This case, as will be noted, is very close to the facts in the case at bar.

The rule established by the cited cases was recognized and applied to the Pickett Bill by Judge Riner of Wyoming in *United States vs. Ohio Oil Company* (not yet reported). It decides the very question here involved in accordance with appellant's contention. The judgment has been recently affirmed by the Circuit Court of Appeals of the Eighth Circuit but the point here involved was not discussed by the Appellate Court.

One of the questions in the Ohio Oil case was whether the defendants were diligently at work at the time of the withdrawal. Defendants claimed the East Half of the Southwest Quarter of Section 18 in Wyoming. The withdrawal there involved was made on May 6, 1914. A well was drilled on the Northwest Quarter, but nothing at all was done on the Southwest Quarter until July, 1914, or more than seventy days after the withdrawal. There was not even a skeleton derrick on the Southwest Quarter. It was urged by the defendants that the work on the

Northwest Quarter was sufficient to hold both locations on the group development theory as against the withdrawal. Judge Riner sustained the contention, and said:

"I think the evidence shows that this work was done and the expenditures made for the benefit of the several claims. It has been so often decided that labor and improvements within the meaning of the statute are deemed to have been had on a mining claim when labor is performed and improvements made for its development, that is, to facilitate the extraction of the mineral the claim may contain, though in fact such labor and improvements be at a distance from the claim, that the citation of authorities seems unnecessary."

The method that was adopted for developing the group in the case at bar may not have been ideal, and may not have been best calculated to develop it, but this is not material. In

Hughes vs. Ochsner, 26 L. D., 540-543,

it was said:

"Civil engineers . . . may honestly differ as to the probable results to be had from a plan of development, and this may be involved as is often the case in such operations in considerable uncertainty, but if money or labor is expended in good faith in the furtherance of the plan, the Department will not look beyond the fact of expenditure."

Approved in *C. K. McCormick*, 40 L. D., 498. See also *Mann vs. Budlong*, 129 Cal., 577.

Is there anything in the language of the Pickett Bill which precludes this Court from holding that the *same kind* of work which would be sufficient for patent after discovery if carried to the extent of \$500.00 is also sufficient to protect the land against withdrawal if carried on diligently and continuously?

Up to the time of the passage of the Pickett Bill Congress had never recognized any rights whatsoever in the claimant of mineral lands before discovery.

The placer mining law was, therefore, entirely unsuited to the physical conditions of oil mining. But no serious injustice resulted until the withdrawal of 1909 was promulgated. To ameliorate the uncertainties thereby created, Congress passed the Pickett Bill. Here for the first time in our mining law the rights of an occupant or claimant of oil-bearing lands prior to discovery received legislative recognition.

The Pickett Act therefore introduces a new conception so far as the mining statutes of this country are concerned. The explorer or operator who had not yet reached a discovery, was given a status. Just as the law as it stood before the Pickett Act recognized the claimant before patent and required of him work of a certain value, so the Pickett Act recognizes the prospector before discovery, and requires of him similar work; the only difference being that the test of good faith imposed upon the claimant after discovery was that his work should equal in value the amount fixed by the statute; the test of good faith applied to

the prospector under the Pickett Act is that his work should be diligent and continuous. Beyond this distinction there is no warrant in the act itself or in the interpretation of the prior mining law for the position that the manner and kind of work which was sufficient for the explorer after discovery is not sufficient under the Pickett Act for the explorer before discovery.

Eliminating the limitation as to the money value, and substituting therefor the requirement of due diligence and continuous work, that which under the former mining laws fixed the rights of the claimant after discovery, under the Pickett Act fixes the rights of the prospector before discovery.

We are in accord with the Government's contention that the Pickett Bill did not purport to be a self-contained statement of the law on the subject, but that it must be read in the light of the existing mining law.

The only difference between the Government and the defendants is that the Government reads the Pickett Bill in the light of a portion of the existing mining law, while defendants insist that the whole of the existing mining law is applicable.

Thus the Government vigorously argues that the rule of *Miller vs. Chrisman* and similar cases was incorporated in the Pickett Bill. This we concede because these cases were a part of the existing mining law. But our concession is limited by the proviso that

the rule of these cases was only incorporated insofar as it was applicable.

The Miller case, as well as all the other California decisions, concerned only the development of isolated claims, and had nothing to do with a group of claims. There is nothing in the language of the statute to justify the inference that it adopted part and rejected part of the general mining law. But, on the contrary, the fair inference is that it adopted the general law as to isolated claims where it was applicable and the general law as to a group of claims where it was applicable.

We cannot subscribe to the Government contention that all recognized principles of the mining law were irrevocably discarded by Congress except the principle enunciated in *Miller vs. Chrisman*.

But appellants are not compelled to rest their case on this well established rule of statutory construction alone.

Nowhere in the Pickett Bill is it said that the work must be done upon the land or upon the claim. In view of the Government's constant iteration that Congress was simply and exclusively enacting *Miller vs. Chrisman*, the omission of this or similar language is very significant.

The proviso of the Pickett Bill is:

"Provided that the rights of any person who at the date of any order of withdrawal heretofore or hereafter made, is a *bona fide occupant or claim-*

ant of oil or gas-bearing lands and who at such date is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired," etc.

The language of *Miller vs. Chrisman* which the Government claims was adopted exclusively is:

"One who thus in good faith makes his location, *remains in possession* and with due diligence prosecutes his work to discovery is fully protected," etc.

Can we assume that the omission of the significant words "*remains in possession*" was inadvertent?

The omission of these words and the departure from the narrow scope of *Miller vs. Chrisman* is emphasized by the use of the words "occupants or claimants." The word "occupant" was obviously designed to cover the *Miller vs. Chrisman* situation, and refers to one who "remains in possession." It clearly designates one in *pedis possessio*, which is obviously necessary if the work is to be done within the boundaries of the claim. But why the use of the word "claimant"? If a claimant must necessarily be at work upon the claim itself, it predicates *pedis possessio*, hence an occupant and the addition of the word "claimant" lends no additional meaning to the statute.

The only construction which gives effect to all the language of the statute is one that recognizes the sufficiency of diligent work off the claim or, in other words, the principle of group development.

As against our position, the Government contends

that nothing but the actual work of drilling a well on each claim can protect the defendant. Unused houses and unused derricks, says the learned counsel, are not sufficient, therefore, actual drilling will alone suffice. Absence of water or other equipment is, they say, no excuse for lack of drilling; nor is work, such as laying a water line to supply such needs, because not done upon the land. At times the government seems to repudiate this position but it is again put forward on p. 12 of its Reply Brief when it says:

"If discovery of oil on a particular quarter section cannot be said to be a discovery on one or more additional quarters, the drilling on a particular quarter section cannot be said to constitute work leading to the discovery of oil or gas on one or more additional quarters."

This view not only necessitates a narrow and illiberal construction of an avowedly remedial statute and the absolute disregard of certain of its language, but is in direct hostility to the adjudication of the land office as expressed in the Honolulu Oil Company case and the opinion of Judge Riner in *United States vs. Ohio Oil Co.*, which are the only decisions dealing with group claims under the Pickett Bill.

Finding small comfort in either the statute or the adjudicated cases, the Government indulges in argument *ad captandum*, as one of the learned counsel was pleased to designate it. A great fear is expressed that many claims will fall into few hands, and the Govern-

ment policy of encouraging the development of small parcels by numerous small operators be defeated.

The suggestion that thousands of acres might be held on the group theory ignores the limitations of the law relating to it, that the claims *must be contiguous* and the work must tend to prove their mineral character or facilitate the extraction of mineral from all.

The land office and the courts have never had any difficulty in applying the principle to Section 2324 and Section 2325 of the Revised Statutes, and the same problems are presented here.

It is a question of fact depending on the circumstances of each case. In the vast majority, the determination of whether the group claim is legitimate and *bona fide* will be comparatively simple. Some difficult questions may arise, but we are not concerned with them here where only four quarter sections are involved and the situation is perfectly obvious. It seems rather strained to contend that defendants are trying to hold a large area with a small amount of work, pursuing a "dog in the manger" attitude, when the Government has always been ready to grant a patent for 160 acres on \$500.00 worth of expenditures and for 640 acres on \$2000.00 of expenditures, while we show the expenditure of \$20,000.00, or ten times the Government requirements, for patent before the Taft withdrawal and in excess of \$500,000.00 up to May,

1914, or enough to patent 1000 claims of 160 acres each.

That the acts of the locators must be such as to give notice to the public of their claims is fully satisfied by the erection of buildings, the actual occupation thereof at all times, and the public record of the locations so that either by physical inspection of the land or by a search of the records the claim was fully disclosed.

The statement in the Government brief (see p. 56) "That the 'assessment work' required by the decision "and by Section 2324 is not the *kind* of 'work' required by that act" (Pickett Bill), is wholly unsupported by the authorities. The *amount* of annual assessment work, to wit, \$100.00 per annum, is admittedly not sufficient before discovery to hold either a single claim or a group of claims, and this is all that the cases decide. If, however, the *kind* of work, good as annual assessment work is carried on diligently and continuously, and without the limitation of a \$100.00 value, then it is sufficient.

The obvious misstatement of the authorities on this point discloses the vital weakness of the Government's argument, which depends entirely on the establishment of this theory.

So again the attempt is made to show that group development depends exclusively on statutory authorization therefor, and Section 2324 of the Revised Statutes is several times quoted. But this requires

us to ignore absolutely Section 2325. This section states the amount of work prerequisite to patent. Like the Pickett Bill, it governs the rights of the operator against the Government. Again, like the Pickett Bill, it does not in terms permit, or even refer to, group development. It even goes beyond the Pickett Bill in its restrictions by providing that the improvements must be "made upon the claim."

And still, the Land Department has held again and again that the \$500.00 worth of work may be done on one of a group of claims, and it has so held because that is the general mining law, in the light of which all statutes must be read.

Where then is the justification for the language on pages 58 and 59 of Appellee's Brief that "a patent expenditure of \$500.00 must be made *on each claim*" (their italics), or "The only departures which have been made from these requirements have been *made in express words by statutory enactment*" (their italics again).

The attention of learned counsel has heretofore been called to the inaccuracy of this statement, and their error can therefore not be attributed to inadvertence, but to the necessity under which the Government labors if it is to succeed in establishing its position. As it is incorrect, and must fall, the whole of the Government argument against group development of which it is the foundation must fall with it.

The citation of *Smith vs. Union Oil Co.* discloses a

singular misapprehension of our position in these cases. All that the learned judge there said was that annual assessment work is not sufficient to hold a group of claims *before discovery*. This is, of course, correct and it might be added that the same ruling might have been made as to hold even one claim.

But the case throws an interesting light on the relation of the *Miller vs. Chrisman* rule to the Pickett Bill. In the Smith case, the defendant, by continuously drilling on one quarter, was attempting to hold another quarter under the so-called Five Claims Act. But at the very time, another operator who had entered peaceably, was likewise drilling diligently on the quarter so claimed.

Now, the rule of *Miller vs. Chrisman* only protects the diligent operator as against forcible, fraudulent, surreptitious or clandestine entries, and it is obvious that in spite of diligent work, anyone can peaceably enter land which is being drilled and, if he make a prior discovery, obtain title thereto.

This is clearly shown in

Hanson vs. Craig, 170 Fed., p. 65.

Since the plaintiffs could have prevailed in the suit had they entered peaceably on the very claim on which the defendants were at work, it is obvious that plaintiffs could not be ousted where they were diligently at work on an unoccupied claim belonging to a group.

It is therefore apparent that the Pickett Bill gives a

greater right against the Government than *Miller vs. Chrisman* gives as against adverse claimants. For, as stated, the diligent operator under the Miller rule is subject to defeat by one peaceably entering and first discovering oil, while under the Pickett Bill the claimant's rights are absolute so long as he continues at work.

The language of the Court in *Hanson v. Craig*, quoting *Costigan on Mining Law*, is as follows:

“*Pedis possessio* means actual possession and pending a discovery by anybody the actual possession of the prior arrival will be protected to the extent needed to give him room for work and to prevent probable breaches of the peace. But while the *pedis possessio* is thus protected, it must yield to an actual location on a valid discovery made by one who has located peaceably and neither clandestinely nor with fraudulent purposes.”

Approved, *Hall vs. McKinnon*, 193 Fed., p. 577.

There remains only on this point the case of *Gird vs. California Oil Co.*, 60 Fed., 531, with which counsel purposes to dispose of group development. In that case, the attempt was made to hold 80 claims before discovery on the group development theory, and in it the learned Judge very fitly disposes of learned counsel's fears that if the doctrine was recognized, large areas might be held with an inadequate expenditure.

The vital question is, did the Court deny the ap-

plicability of the principle of group development? By no means. On the contrary, the fair inference is that the group development theory is applicable even before discovery in a proper case, but that in the case before him, the claims were not contiguous, and too remote to justify it.

The language of the Court (p. 542) is:

“In the case at bar, none of the work done or expenditures made by the lessees of plaintiff relied on to sustain the claim to the Whale Oil were done or made on any claim contiguous to it . . . the claims so held in common must, as said by the Supreme Court in *Chambers vs. Harrington*, be contiguous, and the labor and improvements relied on must be made for the development of the claim to which it is sought to apply them; that is, in the language of the Supreme Court, ‘to facilitate the extraction of the minerals it may contain.’ This, I think, cannot be justly affirmed of any part of the large expenditures shown to have been made by the lessees of the plaintiffs in the development of some of the claims embraced by the leases, all of which are remote from, and none contiguous to the Whale Oil.”

If the learned Judge was of the opinion that the group theory did not apply before discovery, he would certainly have said so, and not burdened himself with an extended analysis of a complicated situation.

In view of the language quoted, it is a fair inference that the only reason for the decision on this point

was that the facts showed the various claims too remote from the place where the work was done.

Respectfully submitted.

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THE UNITED STATES OF AMERICA,

Appellee.

No. 2788.

NORTH AMERICAN OIL CONSOLIDATED,
a Corporation, et al.,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

No. 2789.

**Points Supplemental to the Oral Argument
of Charles S. Wheeler.**

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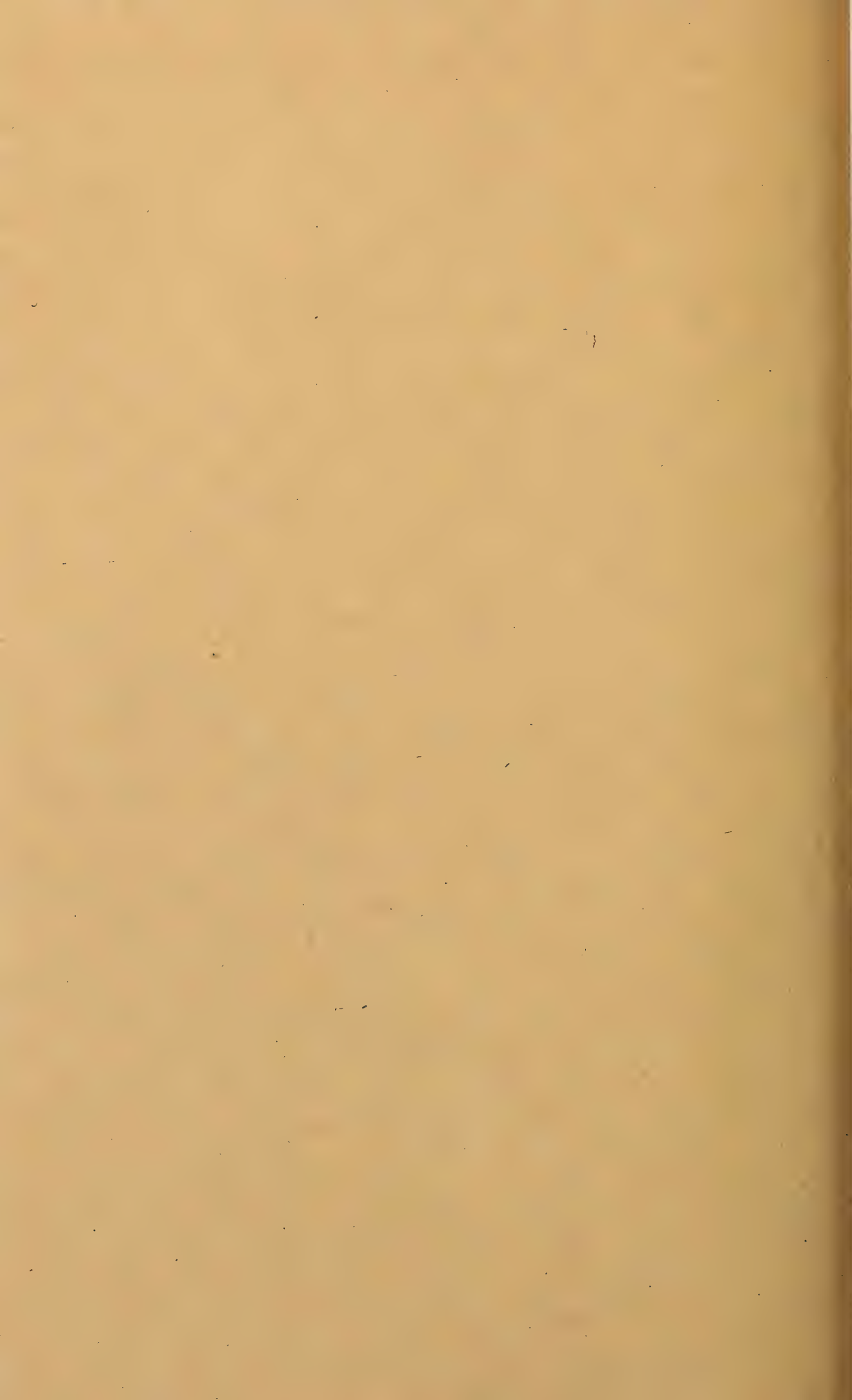
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IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT

CONSOLIDATED MUTUAL OIL COMPANY,
a Corporation, and J. M. McLEOD,
vs.
THE UNITED STATES OF AMERICA,

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POINTS SUPPLEMENTAL TO THE ORAL
ARGUMENT.

I.

Case No. 2789, Relating to Section Two.

The oral argument has reduced this case to a few
very simple propositions of law.

All counsel are now agreed that the government is not entitled to this property if the possession and diligence of the Pioneer Midway Oil Company on the 27th day of September, 1909, were such that the courts at that date would have protected said occupant against hostile intrusion by a private person.

Two things are required before the courts will protect the possession of a mining claimant.

1. He must have the *pedis possessio*; and (2) It must appear that he is with due diligence prosecuting his work toward a discovery.

Miller v. Chrisman, 140 Cal., 440, 447.

The facts here being undisputed the question of "due diligence" is a question of law.

"Due diligence is sufficiently clearly defined to enable the courts to determine whether any given state of facts is sufficient to constitute it or not."

Ophir Silver Min. Co. v. Carpenter, 4 Nev., 534.

RECENT DECISION IN THE EIGHTH CIRCUIT FAVORABLE TO APPELLANTS.

We now have the benefit of the opinion of the Court of Appeals for the Eighth Circuit, affirming the judgment rendered by Judge Riner in the case of *United States v. Ohio Oil Company, et al.*, referred to and relied upon in Appellants' brief.

For the convenience of the Court a copy of said opinion is printed as an Appendix hereto.

The said opinion is authority for several propositions important to this controversy, viz:

1. It is not essential under the Pickett Act that the claimant must have been actually drilling on the date of the withdrawal. The government's contention to that effect is "too narrow."

2. It is not even essential that any work whatever shall have been done upon the land itself prior to the withdrawal order.

3. The following activities are sufficient to make out a case of due diligence at the date of the withdrawal order: Paper locations upon two claims were made more than one year before the withdrawal order. A few days before the withdrawal order, possession was taken and both claims were placed in charge of one caretaker. Two days before the withdrawal some lumber and material was ordered shipped to the lands. An oral contract to drill wells on the property was also made one day before the withdrawal. Tent equipments were brought to the land and put up one day before the date of the withdrawal. The lumber and equipment so ordered to be shipped had not arrived on the land prior to the date of the withdrawal order. *Held*, that the Ohio Oil Company was a *bona fide* occupant of the land "engaged in diligent prosecution of work leading to a discovery of oil" at the date of the withdrawal within the meaning of the Pickett Act.

In the case at bar the efforts of the occupant to begin actual drilling had progressed at the date of the withdrawal so much farther than those held sufficient in the foregoing decision, that little room is left for discussion.

If there was "due diligence" in the Ohio Oil case on May 6, 1914, it seems necessarily to follow that there was due diligence in our case on September 27, 1909.

LAW OF DUE DILIGENCE DOES NOT EXACT THE
IMPOSSIBLE.

However, the claim is made that notwithstanding the elaborate outlays and preparations for actual drilling upon our properties, we must lose all, because the occupant had not succeeded in procuring a supply of water and was not in fact drilling on or before September 27, 1909.

At said date each claim was improved to the point that nothing remained to be done after a water supply was secured in order to start the actual drilling, save to hang drilling tools on the fully-rigged derricks, set up boilers, and place engines in the engine-houses and connect the same. The installation of such machinery, including boilers, was a matter requiring but a few days' work at most. It was something that could easily be done after a water supply was secured and while a pipe-line was being laid to connect up with such water supply. It would be neither wise nor good practice to install the machinery

until water was definitely arranged for. It is to be noted, moreover, that work of a character necessary to development, such as leveling and clearing away brush, was actually going on on each of the claims at the date of the withdrawal order.

But counsel for the government are not satisfied with a showing that all that was reasonably possible had in fact been done at the date of the President's order. They say that the claimant must have done the impossible. They do not dispute Appellants' showing that the occupant on and prior to the 27th day of September, 1909, could not get water; nor do they offer proof that the occupant made no diligent efforts to that end. These facts they say are of no consequence. So, also, the fact that water was brought to the land at the very earliest moment that the water corporation could supply it, and the fact that the occupants were absolutely ready, with their pipe-line laid and machinery in place to start drilling three weeks before the public-service corporation could supply the water, are brushed aside by the government's counsel as affording no explanation of the delay in starting prior to September 27, 1909, which the court can accept.

To so much of this harsh view of the law as requires that drilling shall have begun prior to the withdrawal, the Court of Appeals for the Eighth Circuit has already given the proper reply:

"But, it is claimed that . . . the defendant, the Ohio Oil Company, was not a *bona fide* occupant or claimant of these lands, in the diligent prosecution of work leading to the discovery of oil or gas on May 6, 1914, when the order of withdrawal was made. It is claimed that actual drilling operations were not commenced until July 1, 1914, on the northwest quarter, and on July 31, 1914, on the east half of the southwest quarter, and that until the actual drilling was begun there was no prosecution of work within the meaning of the Act of Congress. We are of the opinion that this is too narrow a view to take of this statute."

United States v. The Grass Creek Oil & Gas Co. and The Ohio Co. (See Appendix).

IN VIEW OF THE PHYSICAL CIRCUMSTANCES OF THE LOCALITY, AND THE MAGNITUDE AND DIFFICULTY OF THE ENTERPRISE, A NECESSARY DELAY OF A FEW MONTHS IN OBTAINING A WATER SUPPLY IS PURELY INCIDENTAL AND EXCUSABLE.

The claimant was called upon to drill at least four wells—each to go down over one-half mile into the earth. This gigantic undertaking was to be performed in an arid country. Water was absolutely essential to it. It is common knowledge that each such well costs from \$25,000 to \$100,000 or even more.

To so much of our opponents' harsh contention as would forfeit the fruits of the claimants' vast outlay and labor, simply because of an unavoidable and relatively brief delay in obtaining a necessary material for this great enterprise, the courts have long since given an answer, for it is settled that a delay in work caused by the inability to obtain a necessary material will be excused.

Courts will take into consideration the surrounding circumstances:

“such as the nature and climate of the country traversed . . . , together with all the difficulties of procuring labor and materials necessary in such cases.”

Kimball v. Gearhart, 12 Cal., 27, 30.

“What is a reasonable time and what constitutes reasonable diligence must depend largely on the facts of the particular case, . . . but it may be said that they depend chiefly on the physical circumstances of the locality, the nature and condition of the region to be traversed, and its accessibility, the length of the season in which work is practicable, the supply of labor, and *the magnitude and difficulty of the works necessary.*”

State v. Superior Court (Wash.), 126 Pac., 945, 953.

“The only matters in cases of this kind which can be taken into consideration are such as would affect any person who might be engaged in the same undertaking, such as the state of the weather, the difficulty of obtaining laborers, or something of that character.”

Ophir Silver Min. Co. v. Carpenter, 4 Nev., 534.

In the same case “due diligence” is defined as follows:

“It is the doing of an act, or series of acts, with all *practical expedition*, with no delay, *except such as may be incident to the work itself*. The law, then, required the grantors of the defendants to prosecute the work necessary to an execution of the design with all *practical expedition.*” (Italics ours.)

What these claimants and their predecessors did was to proceed with all *practical* expedition. Nothing was undone or delayed that it was possible or practical to do. The delay—which was brief in relation to the magnitude of the enterprise—was “incident to the work itself.” It resulted from the “nature and climate of the country,” which made it not only difficult, but impossible to procure a necessary material immediately. It was procured as soon as possible and the work of drilling proceeded diligently thereafter.

The case therefore falls directly within the authorities. There are none which hold that a delay occasioned by a temporary inability to obtain an essential material such as water is fatal to a claim of due diligence.

In their Reply Brief counsel would have it that we sat around supinely during the several months prior to September 27, 1909, doing nothing and dreamily waiting for “somebody” to bring in water. That is not true. We not only put up our buildings and derricks and bought our boilers, but we drilled a well in a fruitless search for water (Tr., p. 62). We made constant, continuous and diligent efforts to secure water (Tr., pp. 59-60), but “it was impossible to get water on said section in sufficient quantity for drilling at any time prior to the 27th day of September, 1909” (Tr., p. 62).

COUNSEL HAVE SHIFTED THEIR POSITION AS TO
SECTION 2.

Since the oral argument, counsel for the government have shifted their position radically. Prior to the filing of their reply brief the only charge which appellants had been called upon to meet was the claim that there had been a lack of diligence in discovery work prior to September 27, 1909. Now our opponents say for the first time that we were derelict between October 12th, 1910, and March 1st, 1911. Hence they insist that while the Pickett Act may have revived our rights for a time we afterwards lost them under said act through a failure to continue to exercise diligence. This argument becomes of importance only in the event that the Pickett Act affects us; for it is only under that Act that the question of continued diligence arises.

Heretofore the contention of counsel for the government has been that the impossibility of obtaining a water supply affords no excuse for our delay in beginning actual drilling prior to September 27, 1909. They have stood upon the proposition that because we did not obtain water and begin to drill during the ninety-six days which passed between the date of the purchase of boilers for our property on June 21, 1909, and the date of the withdrawal order, we had no rights which were preserved by the Pickett Act.

But now counsel evidently have found this position

untenable under the authorities, and for the first time they, in their Reply Brief, come forward with the new claim that these appellants have not been diligent at all times since October 12th, 1910, several months prior to which time we had obtained water and had begun the drilling of our wells.

**NO SUCH ELEVENTH-HOUR CHANGE OF FRONT CAN
BE TOLERATED.**

The government's own pleading and evidence estop it from making such a claim. The complaint contains no allegation that there was no diligence after June 25, 1910. It proceeds wholly upon the theory that the lands were withdrawn on the 27th day of September, 1909 (Tr., pp. 5-6). It asserts that we were not in diligent prosecution of work leading to discovery of oil at the date of said withdrawal (Tr., p. 9). The bill even alleges that we made discovery of oil as early as August, 1910, and that we have extracted large quantities of oil and gas since that time (Tr., p. 7). Not only does the complaint make no charge of lack of diligence after the Pickett Act was passed, but the government presented in support of its application for a receiver the affidavit of Schuyler G. Tryon, who was in charge of drilling operations on this property from March 15, 1909, to March 1, 1911 (Tr., pp. 50-51). In that affidavit the government itself presents to the

Court the following evidence of our diligence during that period:

"That during the entire time affiant was in charge of drilling operations on said Section 2, the said drilling operations proceeded with all possible diligence and all said wells aforesaid were drilled as expeditiously as possible under existing conditions as to water and delivery of freight" (Tr., p. 56).

And now in the face of their own pleading and said affidavit, counsel for the government pick out from this same affidavit a mere inference that during Tryon's superintendency no drilling was done on any of these claims between October 12, 1910, and March 1, 1911, and are bold enough to say to this Court, in the very teeth of the said affidavit of their own witness to the contrary, that we were not diligent during all of said Tryon's time!

Comment is perhaps unnecessary. But the fact is that Mr. Tryon's affidavit does not fairly justify any inference that there was any period after the Pickett Act was passed during which drilling was not in fact going on. Said affidavit tells of successive drilling on each of the four quarters of the section. As to three of these quarters Mr. Tryon is particular to say that drilling stopped on designated dates and was not resumed thereafter (Tr., pp. 54-55). *But as to Well No. 1 on the SE $\frac{1}{4}$ the affiant makes no such statement* (Tr., pp. 52-53). This fact coupled with said Tryon's declaration that the work progressed with all of the diligence possible under the existing

conditions, properly gives rise to the inference that after drilling ceased on Well No. 4, drilling was resumed on Well No. 1 and was still in progress when Mr. Tryon left the property.

Mr. Laymance's affidavit, moreover, shows that in October, 1910, water was obtained from a new well on this section of land; that it was used and proved insufficient; that shortly after beginning to use it, he laid a two-inch pipe from the center of the section to another supply which furnished water enough to drill one well at a time. Said affidavit also shows that he had to "rotate" in the drilling, viz: that the water supply was sufficient to run but one set of tools at a time. Both he and Tryon say that all of the wells were drilled as expeditiously as possible under the existing water conditions (Tr., p. 66). The only fair inference from this testimony is that one string of tools was continuously at work on the section during the period between October, 1910, and March, 1911.

But if it were true—and it is not—that we did not drill between October, 1910, and March, 1911, what difference would it make, since the government does not allege in its complaint that the rights preserved to us by the Pickett Act ceased under that act for want of subsequent diligence? How could the mere fact—even if it were true—that no drilling was in progress during said period, affect us adversely when the affidavit prepared and filed by the government shows that we actually went ahead during that

period as diligently as possible under existing conditions as to water? If one is as diligent as is *possible*, that should satisfy any conceivable rule of due diligence called for by the Pickett Act.

THESE LOCATIONS WERE NOT WITHDRAWN BY THE ORDER OF SEPTEMBER 27, 1909, AND THE PICKETT ACT DOES NOT APPLY TO THEM.

The proviso in the Pickett Act is a restriction upon the President's otherwise unlimited power to withdraw from entry all locations or claims not perfected by discovery. The President in such an order may or may not have used language which would have the effect to impair such rights as were ours on September 27, 1909.

If the President so words his order that the rights of the locator would in the absence of remedial legislation be "affected or impaired by such order," then and only then does the Pickett Act step in and say that the order of the President shall not operate to affect or impair the claimant's rights so long as the claimant shall continue in diligent prosecution of discovery work.

But if, as in the order of September 27, 1909, the President himself has excluded from the withdrawal all *bona fide* locations which at that moment are attended with possession and due diligence, then of course the President's order does not purport to "affect" or "impair" the rights of the occupant of

such locations, and there is nothing upon which the Pickett Act can operate.

It results, therefore, that it is only in the event that this Court shall refuse to follow *United States v. McCutchen*, 234 Fed., 702, 711, in regard to the effect of the withdrawal order that the Pickett Act can be held to have any application to the land in suit. If said Act has no application thereto, then, of course, the question of continued diligence called for by said Act, cannot arise in this case.

APPELLANTS WERE PERMITTED BY THE WITHDRAWAL ORDER TO PROCEED TO MAKE DISCOVERIES. THEY HAVE DONE THIS AND NO QUESTION OF DILIGENCE CAN EVER ARISE IN SUCH A CASE.

The question of continued diligence arises only in cases to which the Pickett Act applies.

If the construction given to the President's order in *United States v. McCutchen*, 234 Fed., 702, 711, is followed by your Honors, then our locations, because of the fact that they were attended on September 27, 1909, with actual possession and due diligence, did not become a part of the withdrawn area.

The Pickett Act in that event does not apply to our case. Each of our claims continued to be, at least as to us, a part of the open public domain. We went ahead on each claim and discovered oil. Our rights are exactly what they would have been had our locations been upon any other public land not affected by the withdrawal order, viz: Upon each

discovery our right to the location became a vested right which the government could not take from us, unless by eminent domain.

Manuel v. Wolf, 152 U. S., 504.

The government can no more question these claims for any alleged lack of diligence prior to discovery than it could question on the like ground the perfected claims of any other miner upon the open public domain.

Under the general mining laws the government does not care whether the locator is diligent or not after posting his notice and prior to discovery. His right is perfected by a discovery regardless of any question of his diligence *ad interim*.

How soon after posting our notices, or how soon after September 27, 1909, we made discovery of oil is of no consequence. Even a delay of eight years would not matter.

Borgwardt v. McKittrick Oil Co., 164 Cal., 651.

Weed v. Snook, 144 Cal., 443;

Miller v. Chrisman, 140 Cal., 448.

It is enough that our claims were valid and existing at the date of the withdrawal order, that we went on—whether diligently or otherwise does not matter—with our discovery work, and that discoveries have

long since been made. The government cannot now deprive us of our vested rights in these perfected locations.

THE RIGHT TO "PROCEED TO ENTRY" UNDER THE TAFT
WITHDRAWAL ORDER INCLUDES THE RIGHT TO PRO-
CEED TO MAKE A DISCOVERY.

Counsel for the government say:

"The position of Appellants necessarily involves the contention that President Taft intended to provide for entry under the mineral land law *where there had been no discovery.*" (Italics ours.)

Reply Brief, p. 3.

This is a misconception of our position. We do not claim that entry in the Land Office could be made under the President's said order until after a discovery. Mining locators in actual possession are allowed by general law to go ahead with their drilling, make their discoveries, enter the land, and obtain patents therefor. That was the "usual manner" in which such locations were wont to "proceed to entry." And that is what President Taft's order obviously means. That, moreover, is exactly what it has been held to mean in *United States v. McCutchen*, 234 Fed., 702, 711. Before entry in the Land Office there must be a discovery on each location.

IF THE PICKETT ACT IS APPLICABLE TO OUR CASE IT SHOULD BE NOTED THAT SAID ACT IS NOT CONCERNED WITH THE LOCATOR'S DILIGENCE BETWEEN SEPTEMBER 27, 1909, AND JUNE 25, 1910, THE DATE OF THE ACT.

We have dealt with this proposition in our briefs and on oral argument. Counsel for the government now come back to it in their Reply Brief, pp. 24-25, and insist that the Act calls for continuous diligence from and after September 27, 1909.

The Act plainly says that "the rights of any person "who at the date of any order . . . heretofore " . . . made, is a *bona fide* occupant and who at " *such date* is in diligent prosecution of work' . . . "shall not be affected or impaired by such order so "long as such occupant *shall continue* in diligent "prosecution of said work."

Counsel for the government would wrest this language from its obvious grammatical meaning in order to make it exact a continuance of work, in defiance of the President's order, between September 27, 1909, and the date of the Act. To accomplish this, they distort the words of the statute as follows:

"The Act . . . provided that the right which it extended should not be affected or impaired *so long as there was a continuation* of 'diligent prosecution of said work.'"

Reply Brief, p. 24.

But that is not what the Act says. Its words are "so long as such occupant or claimant *shall continue*

in”—not, ‘*so long as there was a continuation of*’—“diligent prosecution of said work.”

Diligence at the date of the withdrawal, and (as to past withdrawals) from and after the date of the Act is all that is called for in the way of diligence. What discovery work the occupant may have done in the interim or failed to do is not material.

Were it otherwise the Court would not, of course, overlook the fact that water conditions continued the same at all times between June 21, 1909, and March 15, 1910. The fact that appellants were unable to drill during that whole period because of this shortage of water would not in any event evidence a lack of diligence.

II.

Cases No. 2787 and No. 2788, Relating to the N. E. $\frac{1}{4}$ and the N. W. $\frac{1}{4}$ of Section 28.

What we have said above when dealing with Section 2 in advocacy of the interpretation put upon the Taft withdrawal order in *United States v. McCutchen*, 234 Fed., 702, 711, applies also to this section.

If that case is to be followed on that question—and we submit that it is a correct determination and should be followed—then we are not in either of these suits affected by the Pickett Act. We were using due diligence on each of our claims at the date of the withdrawal; they were therefore not withdrawn from entry so far as we were concerned. We

have since proceeded to discovery on each claim and that ends the matter.

Our opponents' argument and brief proceed entirely upon the theory that the Pickett Act—and not the withdrawal order and the general mining law—governs our rights.

While confident that *United States v. McCutchen* will be followed and hence that the Pickett Act does not apply to these two cases, we must nevertheless proceed upon the contrary assumption and answer our opponents' views on the Pickett Act.

OUR POSITION ON SECTION 28 MISSTATED.

Counsel misstate our position on page 15 of their Brief, when they say "in numbers 2787 and 2788 it is "not even contended that work of any character what-ever was in progress at the date of the withdrawal." Our contention is directly to the contrary.

In these cases Appellant McLeod and his lessee were in diligent prosecution of work leading to a discovery of oil on the land in question at the said date.

There is no room for the slightest doubt on that point, for on June 25, 1909, within three months prior to said date of withdrawal, the lessee had agreed to drill wells on each quarter of section 28 (Tr., p. 78), and had pursuant to that purpose built a large central camp (Tr., p. 79), and had erected a storage water tank (Tr., p. 85) and built a two-inch pipe-line

four miles long to the only available water supply, and built a derrick on each quarter section; and some thirty days before the order was made, had begun drilling on the first well and was actually drilling when the order was made.

Such a showing of diligence should satisfy the most exacting test. But here again it is insisted that due diligence demands the impossible—that we should have been drilling four wells contemporaneously on said 24th day of September, 1909. The answer is that this was a physical impossibility, for the reason that although the pipe-line and storage facilities were of proper capacity to accommodate more water, it was impossible to obtain at that time a supply which was more than barely sufficient to run a single string of drilling tools (Tr., pp. 79, 100-104).

The law of due diligence does not exact the impossible. It takes into consideration the physical and climatic conditions of the region, the magnitude and difficulty of the enterprise and the temporary impossibility of procuring a necessary material, such as water.

Kimball v. Gearhart, 12 Cal., 27, 30;

State v. Superior Court (Wash.), 126 Pac.,
945, 953;

Ophir Silver Mining Co. v. Carpenter, 4 Nev.,
534.

On and prior to September 27, 1909, the claimants of these lands did everything possible toward drilling on this land, and that phase of the controversy may be dismissed.

It is not conceivable that a court would have refused to protect our possession of these two claims against hostile intrusion on that date; and that is admittedly the sole test of the diligence which both the general law and the Pickett Act call for.

THE CLAIM THAT WE MUST HAVE BEEN ACTUALLY DRILLING ON EACH CLAIM AT THE DATE OF THE WITHDRAWAL HAS BEEN ADJUDGED TO BE TOO NARROW.

Counsel's contention that we must have been actually drilling on each claim on the day of the withdrawal has been set at rest by the decision of the Eighth Circuit:

"It is claimed that actual drilling operations were not commenced until July 1, 1914, on the northwest quarter, and on July 31, 1914, on the east half of the southwest quarter, and that until the actual drilling was begun there was no prosecution of work within the meaning of the Act of Congress. We are of the opinion that this is too narrow a view to take of this statute."

United States v. The Grass Creek Oil & Gas Co. and The Ohio Oil Company (Printed as an Appendix hereto).

This shows that the second well was not started for about one week after oil was produced in the first. The full details of the order in which the

work was done are given with appropriate references to the record in the brief of appellees in that case, pages 8-9, and are as follows:

"On June 25, 1914, the pipe for the Ohio Oil Company's water line to the NW $\frac{1}{4}$ of Section 18 was laid (Rec., p. 78), and drilling operations were immediately, upon the completion of the rig, started, continuously prosecuted, and oil in commercial quantities was obtained on the quarter section last mentioned on July 14, 1914 (Rec., p. 118).

"Immediately after July 14, 1914, the rig was moved over to the East half (E $\frac{1}{2}$) Southwest quarter (SW $\frac{1}{4}$) of Section Eighteen (18), and no delay occurred in prosecuting the work of producing oil in commercial quantities on that tract of land (Rec., p. 118).

"The timber and material that were in the derrick for drilling on the tract last mentioned were, for the most part, put there July 16, 1914 (Rec., p. 151). Immediately upon the completion of the rig, drilling began at midnight of July 31, 1914, on the East half (E $\frac{1}{2}$) Southwest quarter (SW $\frac{1}{4}$) of Section Eighteen (18), and was continuously prosecuted until completion of the well, which occurred on August 10, 1914, oil in commercial quantities being obtained (Rec., p. 118)."

We thus see that in the case in the Eighth Circuit the derrick was erected for drilling the second well after the first well was completed, and the rig used on the first well was then moved over to the other claim. In other words, we have in that record a plain case of consecutive drilling.

The Court holds that such consecutive drilling is a diligent prosecution of work such as is called for by the Pickett Act.

If it be objected that one well followed closely upon another in that case, the same is true in the case

at bar; for here without waiting to complete our first well we began to drill the second and the third (Tr., pp. 110-112), and from one to three strings of tools were operating until ten producing wells were drilled.

If it be objected that in the Wyoming case it took but a few weeks to drill a well; that the oil was obtained at about 1000 feet, and that all discoveries were made within a period of four months from the time the work preparatory to drilling began, and that it would be an improvident waste of money to go to the expense of buying extra rigs for drilling the wells contemporaneously—the answer is:

First: When we began the drilling of our wells we expected to discover oil in from thirty to ninety days (Tr., p. 88). No long delay was expected.

Second: If consecutive drilling will satisfy the law of due diligence where all of the conditions as to water and depth are favorable and the drilling relatively inexpensive, and if in such cases the failure to drill the wells contemporaneously is merely a question of saving money, how much more must it satisfy the said law when, as here, the conditions are thoroughly difficult, the available water supply deplorably inadequate, and where the cost of drilling to a great depth is necessarily very great? In the Wyoming case, moreover, consecutive drilling appears to have been a matter of choice. In our case, on the con-

trary, consecutive drilling was an absolute necessity, because the water could not be had with which to drill any more expeditiously.

THE FACTS HELD BY THE EIGHTH CIRCUIT TO EVIDENCE DUE DILIGENCE AT THE DATE OF THE WITHDRAWAL ORDER ARE MUCH LESS CONVINCING THAN THOSE HERE BEFORE THE COURT.

In that case practically nothing at all had been done on the land prior to May 6th, 1914, the date of the withdrawal order there in question.

Location notices had been posted on July 20, 1913. The claimant had not even had the *pedis possessio* between July, 1913, and April, 1914. A few days before the order was made one man was placed in charge of the two claims as "caretaker." Not a building or derrick was on the ground until after the order was made. The things done and the oral lease and the agreement made one day before the withdrawal order for drilling two wells are far less convincing as evidence of diligence than are the written lease which we have in this case from McLeod to Mays of June 25, 1909 (Tr., p. 90), and the improvements made and work done pursuant thereto prior to the date of withdrawal.

THE MEANING ASSIGNED BY COUNSEL TO THE PHRASE "AT THE DATE" IS ALSO TOO NARROW.

The law does not exact that we must have been doing any actual physical work on or relating to these properties on the very day of the withdrawal. The

law says that we must have been in diligent prosecution of work leading to discovery of oil or gas on the lands we occupy or claim “at the date”—not “on the day”—of the withdrawal order.

“The authorities corroborate this interpretation of the word ‘at’: That, when used both as to time and as to place, it has a certain latitude of intent, and means often ‘near’ or ‘about.’ *Rogers v. Galloway Female College*, 64 Ark., 627; 44 S. W., 454; 39 L. R. A., 636; *Bartlett v. Jenkins*, 22 N. H., 53, 63; *Hunter v. Wetsell*, 84 N. Y., 549, 554; 38 Am. Rep., 544; *United States v. Buchanan* (D. C.), 9 Fed., 689, 691; *Minter v. State*, 104 Ga., 743, 752; 30 S. E., 989; *Rice v. Kansas Pac. Ry.*, 63 Mo., 314, 323. It is quite clear from these authorities that there is no absolute or verbal necessity of construing ‘at’ as strictly equivalent to ‘on.’”

Lorraine Mfg. Co. v. Oshinsky, 182 Fed., 407, 408.

In construing a remedial statute a liberal meaning is to be given to the words used. Our work in building a pipe-line, erecting derricks, buildings and structures on these two claims between June 25, 1909, and September 27, 1909, means that we were diligently prosecuting work “at” said last named date.

THE LEASE WAS ENTIRELY CONSISTENT WITH THE
LAW OF DUE DILIGENCE. THAT LAW SANCTIONS
CONSECUTIVE DRILLING.

It is objected that the lessee could abandon the lease after drilling the first well. But if there were no lease the claimant could do the same thing at any time—even if he himself were drilling four wells contemporaneously. There was therefore nothing con-

trary to the spirit of the law in a lease which under certain conditions would permit the lessee to do exactly what the lessor could do.

Again, it is claimed that because the lease of June 25, 1909, calls for the immediate drilling of one well, and then for the contemporaneous drilling of three more as soon as the first is completed, that we have actually bargained to drill in a way that was not diligent.

One answer to this is that the lease was entered into by both parties with a full knowledge of the existing water conditions (Tr., p. 79). They knew that water was immediately available for but one string of tools. They expected that the water company would improve its supply as it was promising to do (Tr., pp. 79-80), and that more strings of tools could be used contemporaneously by the time the first well was completed.

But had these facts not existed, a thoroughly conclusive answer is nevertheless afforded by the fact that:

Where there are several contiguous claims, the law of due diligence is satisfied if they are drilled consecutively.

The recent decision handed down in the Eighth Circuit, which is printed as an appendix hereto, has set this question at rest.

The court recites the facts as to the consecutive drilling as follows:

"He began actual drilling operations on the northwest quarter on July 1, 1914, as soon as the drilling apparatus

had been erected and was in working order, finishing the well on July 24, 1914, when, having drilled to a depth of 1047 feet, oil in commercial quantities was discovered. Actual drilling on the east half of the southwest quarter was begun by him on July 31, 1914, and continued until August 20, 1914, when oil was discovered in commercial quantities at the depth of 965 feet."

See Appendix.

MEANING OF "WORK LEADING TO DISCOVERY OF OIL OR GAS."

This phrase in the Pickett Act is entitled to a liberal interpretation.

It does not mean that the work going on must actually result in the technical "discovery" which is essential to perfect a mining location. Work actually and diligently going on on a claim on September 27, 1909, may result in no discovery at all. It may result in a dry hole, which is ultimately abandoned; and yet no one will doubt that such drilling is "work leading to discovery."

It is the character of the work at the date—not the final result of it—that counts.

Suppose that we had actually been drilling at our two derricks on these claims on September 27, 1909. Suppose that we had ultimately lost both holes, or had become discouraged at not finding oil therein at great depth, and after two years of drilling, had gone half a mile higher up on the formation on these same claims and had built new derricks, bought new machinery, obtained a different water supply and thus beginning

altogether anew, had finally discovered oil at the new wells:

Would it be said that we would lose our claims because the work which we were actually doing on September 27, 1909, had not literally resulted in a technical discovery?

The very obvious answer is that the result of the particular work going on at the date of a withdrawal is not the criterion. "Work leading to discovery" is work such as men do when they wish in good faith to determine the oil bearing character of their tract of land and to develop oil wells thereon. It is for this reason that actual drilling on one part of a tract consisting of four claims or less may properly be said to be "work leading to discovery" on each and all of the claims. Congress recognizes that such work may "tend to determine the oil bearing character" of at least five contiguous claims, as witness the "Five Claims Act."

If one is actually doing work which will *tend to determine the oil bearing character* of his land, it is too narrow a construction to say that it is not of a character to "lead to discovery of oil." Of course a well on one claim will not *directly* result in a technical "discovery" for each of the adjoining claims, but it will *lead* to discovery—and the law says "lead to"—not "directly result in"—discovery.

We do not claim, as counsel seem to think, that drilling and discovery on one claim will perfect all four of the claims. Discoveries must, of course, be

made on each claim before they can go to entry and patent. However, there can be no better inducement to discoveries on contiguous claims than a successful well on adjoining property. Nothing will be more certain to "lead to discovery" thereon. Even an unsuccessful well near to other claims affords a reliable guide and aid in drilling the discovery wells on the contiguous claims. Anything that may fairly be said to be a substantial aid in drilling a well on a claim is work "leading" to discovery thereon. Thus buildings, roads, reservoirs, pipe-lines—all off the particular claim—may under proper circumstances, be held to be work leading to discovery on said claim. Similarly actual drilling on one of the claims may "lead to discovery" on all.

NO TENDENCY TO MONOPOLY—THREE HUNDRED CLAIMS COULD NOT BE HELD ON WORK DISPROPORTIONATE IN CHARACTER AND VALUE TO THE MAGNITUDE OF THE ENTERPRISE.

Next it is suggested that this interpretation would lead to a monopoly; that if work on one well on one claim might evidence due diligence on three other claims, then why not three hundred? The answer is that mere drilling on one claim is not what we rely on. We rely on all of the other work done for the purpose of drilling on the other three claims—the construction of derricks, houses, tank and water pipeline—coupled with the drilling of the one well, the log of which will be an aid to, and is to be imme-

diately followed by, the drilling of wells on the other claims.

As to the suggestion that the same evidence might serve for three hundred claims, we answer that manifestly it would not. The claimant must first show that he was duly diligent with reference to all of his claims at the date of the order. What he has actually done must, of course, be upon a scale commensurate with the size of the tract he is claiming. We know that a two-inch pipe-line and a 1200-barrel tank are of a capacity sufficient, if the water supply is adequate, to serve the drilling necessities of four contiguous claims. How much further it would go we need not here decide. We know also that our camp buildings and improvements were suitable and adequate for drilling four wells. We know, too, that the law itself has long recognized that discovery work done on one claim may "tend to determine the oil-bearing character" of four adjoining claims. One company might well claim four or five contiguous claims where the work on each of them was such as we have here, without suggesting in any way a lack of good faith. But this would not mean that a claimant could establish himself as a *bona fide* claimant if he put forward this same work and improvement as evidence of due diligence on a great number of locations covering two whole townships. It all comes back in each case to the question: Were the things actually done of enough consequence with reference to the enterprise in hand to

evidence good faith and reasonable diligence with regard to the several claims making up the tract claimed? This is a question as readily susceptible of judicial determination as is the question of due diligence with reference to a single tract of 160 acres.

**NEITHER DUE DILIGENCE NOR PUBLIC POLICY EXACTS
A NEEDLESS WASTE OF MONEY.**

The learned Attorney General in his letter of April 16, 1916, to Secretary Lane says:

“Again, it hardly seems possible that a series of claims can be held by working diligently for them seriatim, or by scattering diligence over them, so to speak, working now for one alone, and again for another. The situation must be looked at, of course, from a point of view entirely different from that which would prevail if the tracts were already under a common, private ownership. In that event, sound business judgment might dictate that preliminary operations should be confined to some one tract, and that expenditures upon the remaining tracts should be deferred to await results. Failure to obtain oil at the place selected for the first drilling might dictate the abandonment of the entire enterprise. Success there might not only demonstrate the value of the remaining lands, but might furnish fuel for subsequent operations. So a single water pipe, of moderate dimensions, extended in succession to one tract after another, might suffice for drilling on the tracts in sequence; whereas a much larger and more expensive pipe line, with branches, or a number of such lines would be required to conduct drilling on all of the tracts contemporaneously. But however wise such methods would be from an economic standpoint on the part of an absolute owner, I am unable to persuade myself that such foresight and economy can be taken as a substitute for the diligence required under the mining law as to each tract sought to be held.”

This point of view was directly in conflict with the view of Commissioner General Tallman, who said in the Honolulu case:

"If, when viewed from a practical business standpoint and in accordance with good, approved practice, the preliminary work of building and maintaining roads, the development of water and fuel systems, the installation of machinery and the construction and equipping of camps are necessary to the work of discovery or essential as an economic business proposition, then in my judgment such work and improvements may properly be recognized as work leading to discovery within the meaning and contemplation of the act, provided it is clearly apparent from all the facts that such work and development are designed and intended to develop the particular claim in question."

The Eighth Circuit, by sanctioning the consecutive drilling of claims as a proper showing of diligence under the Pickett Act, has refused to follow the views of the learned Attorney General. This was to be expected, for they were utterly wrong from a legal standpoint. In one breath he conceded that the diligence required under the Pickett Act was the same that would have served to maintain in court the possession of the occupant against a hostile intruder. In the next breath he endeavored to exact of the occupant or claimant a degree of diligence in pushing toward discovery which was unusual, extraordinary, unreasonable, which called for an expedition that was impractical, and which if followed would have been attended by senseless waste. This

the law does not demand. It does not call for any unreasonable or impractical haste.

"The law does not require any unusual or extraordinary efforts, but only that which is usual, ordinary and reasonable.

"The diligence required in cases of this kind is that constancy or steadiness of purpose or labor which is usual with men engaged in like enterprises, and who desire a speedy accomplishment of their designs.

"Such assiduity in the prosecution of the enterprise as will manifest to the world a *bona fide* intention to complete it within a reasonable time.

"It is the doing of an act, or series of acts, with all practical expedition, with no delay, except such as may be incident to the work itself."

Ophir Silver Mining Co. v. Carpenter, 4 Nev., 535, 546-7.

What is there in the spirit of any law touching this case, we would like to ask, which would have made it of advantage to the government if we had drilled our four wells contemporaneously and with economic waste?

Had the withdrawal order never been made, the government would not have cared how much time we took to make our discoveries after posting our location notices.

The beginning of work eight years after such posting was held to be in time in *Borgwardt v. McKittrick Oil Co.*, 164 Cal., 651. Therefore, previous to the withdrawal order it would not have concerned the government one whit whether we were diligent or slothful, or whether we had one or four claims.

To come within the protection of the Pickett Act, however, we must have been diligent at the date of withdrawal and we must continue diligent. But if we were reasonably and sensibly diligent and were doing with the land just as if we held a patent and wanted to develop the land in the best possible way, why should the government want to force us to rush ahead to drill three additional wells simultaneously within a few hundred feet of each other, and of the first well, without waiting to get the benefit of the log of the initial well?

Would the people get their oil and gasoline any cheaper if the cost of the wells was needlessly increased?

Would the government have to pay less for the oil that it buys if the oil wells cost more?

Would the land but for our method in drilling consecutively have been open to other citizens to locate oil claims on?

Are we, by keeping any citizen off the land, getting a monopoly of mining ground contrary to public policy?

And finally is the Pickett Act merely a trap to discourage us and so force us off the land by compelling us to proceed with our very difficult undertaking ^{in a manner} contrary to sound business principles?

The answers to all of these questions are obvious and from them it follows that no question of public policy arises under the general mining laws or under

the Pickett Act which calls for a simultaneous, wasteful and uneconomical drilling. Much less does it go to the absurd length of exacting simultaneous drilling if simultaneous drilling is impossible for lack of sufficient water.

IF THE PICKETT ACT APPLIES TO THESE THREE CASES, THEN IT SHOULD BE NOTED THAT SAID ACT DOES NOT AUTOMATICALLY FORFEIT THE RIGHTS OF THOSE WHO DO NOT CONTINUE TO USE DUE DILIGENCE AFTER ITS PASSAGE.

This is a further answer to the appellee's change of front regarding Section 2. It also means in all cases that if consecutive drilling is not due diligence the forfeiture is waived unless the government sues prior to discovery of oil.

Suppose—contrary to the fact—that it were true that although the claimants on Section 2 were duly diligent at all times prior to September 27, 1909, and for a time after June 25, 1910, they nevertheless had done no work for several months preceding March, 1911. Suppose, further, that in March, 1911, they again became very diligent, and went ahead and made discoveries, and on each of their claims for several years before this suit was brought had been extracting oil from all of their wells:

Could the government upon the foregoing facts, now step in and say: "Five years ago before you "had made your discoveries you were not diligent "for a while. Your rights were forfeited automatic-

“ally at that time by virtue of the provisions of the
 “Pickett Act. Since that time you have been tres-
 “passers. You must forthwith surrender up to us
 “this property, and all of your improvements are con-
 “fiscated”?

Whether or not this is the effect of the Act depends upon the nature and extent of the right which the general mining law supplemented by the Pickett Act confers upon one who was a diligent occupant at the date of the withdrawal order.

The Act declares that the occupant's rights shall not be affected or impaired by the President's order *“so long as he continues in diligent prosecution of work leading to discovery of oil or gas.”*

If this phraseology creates a condition subsequent, then the rights of the occupant will not be cut off automatically. There must be a re-entry or its equivalent, such as an action of ejectment, and upon settled principles of law, if no suit is brought prior to discovery, any breach of the condition subsequent is waived.

*Under the Pickett Act the Occupant Has More Than
 a Mere License.*

The claimant under the Pickett Act has much more than a mere license. The government has made to him much more than a mere general offer applying to all citizens alike. The said Act, coupled with the rights given by the general mining laws, singles out

the occupant or claimant and confers upon him the following rights in the specific real property he is occupying:

1. He alone—not the general public—is granted the right to enter upon, possess and occupy the tract of oil or gas bearing land which he claims. His right, let it be noted, is attached to specific land.

2. He cannot thereafter be ousted from possession by any private individual, however peaceable and unopposed the stranger's entry. No third person can take advantage of any lack of subsequent diligence on the occupant's part.

3. The occupant may at any time sell or otherwise convey away his possessory and other rights, and these rights will pass upon his death to his heirs or devisees.

Rooney v. Barnette, 200 Fed., 700, 710;

Hullinger v. Big Sespe Oil Co., 28 Cal. App.,
69, 73.

4. The government promises the claimant that his right of occupancy, provided he continues to be duly diligent, shall continue until such time as Congress sees fit—if it ever does see fit—to go through the slow and deliberate process of passing an Act putting an end to his rights. But it further assures him that a discovery will entitle him to hold and work the property.

5. No presidential withdrawal order can affect or impair his rights at the date on which it is made, or thereafter, "so long as such occupant or claimant shall continue to exercise such diligence." So long as he continues diligent, the government itself, without a prior Act of Congress, cannot re-enter upon his claim.

6. The government further promises the claimant that if he shall discover oil or gas on his claim at any time before Congress has revoked his right, he shall after making certain expenditures, have the further right to buy the land at \$2.50 per acre and receive the government's patent therefor.

This conditional right of possession for a term which may thus extend over many years—a right which will ripen upon discovery into a vested right to the land and to purchase it in fee simple—a right which cannot be destroyed by the exercise of the arbitrary powers of the President—is, we submit, an interest in land.

London & Southwestern Ry. Co. v. Gomm,
20 Ch. Div., 562.

Merrill v. Mackman, 24 Mich., 279;

Painter v. Pasadena L. & W. Co., 91 Cal., 84.

Neither the fact that the right may be determined prior to discovery by an Act of Congress nor the further fact that the right may be lost if the diligence of the claimant does not continue, militates against

the fact that the occupant has an interest in the land. On the contrary, they emphasize the character of the claimant's right. Similar or analogous provisions are found every day in deeds and leases.

But whether it is an option, an offer, a transferable license or an interest in the land, is not the important thing. The important thing is that it is a valuable right which will be terminated, if at all, not by a limitation but by a condition subsequent.

Pickett Act Creates a Condition Subsequent—Not a Limitation.

The distinctions between a limitation and a condition are well understood.

"The principal difference between a condition and a limitation is, that a condition does not defeat the estate when broken, until it is avoided by an act of the grantor or his heirs; but a limitation marks the period which is to determine the estate, without entry or claim."

Smith v. White, 5 Neb., 405, 407.

"Conditions render the estate voidable, by entry.

"Limitations render it void, without entry.

"If, upon failure of that upon which the estate is made to depend, no matter how expressed in the deed, the land is to go to a third person; this is a limitation over, and not a condition. For if a condition, an entry by the grantor would be necessary; and he might defeat the limitation by neglecting to enter.

"A limitation is imperative, and is determined by the rules of law.

"A condition not only depends on the option of the grantor, but is also controlled by Equity, if the grantor attempts to make an inequitable use of it.

"The performance of a condition is excused by the act

of God, or of the law, or of the party for whose benefit it was made."

Greenleaf's Cruise on Real Property, Title XIII, Ch. II, pp. 46-47, Note.

See also:

Smith v. Smith, 23 Wis., 176.

Whether or not a limitation or a condition is created is purely a question of interpretation. This Court may say "Yes" and it may say "No."

A situation quite analogous is to be found in *Sperry's Lessee v. Pond*, 5 Ohio, 387. It there appears that in 1820 one Sperry deeded to one Clark an acre of land to be enjoyed and occupied by Clark, his heirs and assigns "so long as he, the said Clark, his heirs and assigns, shall keep a saw-mill and grist-mill doing business on the premises, allowing, however, all necessary time for repairs, and no longer." Clark erected the mills, and conveyed to one Pond. The grist-mill does no business and was out of repair from 1821 to 1825, and again from 1826 until suit was brought. The saw-mill was out of repair and did no business from the spring of 1824 until the fall of 1825. The court says:

"If the terms of the deed are such as to be construed a limitation (although the reversion was not disposed of, and Sperry could enter for a forfeiture without destroying any remainder), then, the estate of Pond terminated in 1821, and by operation of law, vested in Sperry, where it has ever since remained. 2 B. C., 109, 155. If the

estate of Clark was *on condition in deed*, then the forfeitures, which happened by suffering the grist mill to remain still and out of repair, in 1821, and suffering the saw mill to remain still and out of repair, in 1824, *were saved by having them both running in 1826*, if Sperry knew of their being out of repair, and of the repairs going on, and did not enter or forbid the repairs. But by supposing the grist mill to go out of repair in 1826, and cease to grind, a forfeiture again occurred, and as the grist mill was not repaired and put in operation before a demand was made by Sperry, the forfeiture still continues. An entry or demand of Sperry revested the title in him. The bringing of this action is such a demand as, in England, would entitle him to recover for the forfeiture."

In the foregoing case the court does not expressly decide whether the provision there in question was a limitation or a condition. There may well have been some proper doubt on this question; for it will be noted that the fact whether the saw-mill and grist-mill were doing business upon the premises, as required by the grant, was a fact that could be readily and clearly ascertained with accuracy as to date; and since it is merely a question of nice interpretation, this fact might aid the conclusion that a limitation rather than a condition was intended. The court was, however, evidently left in doubt as to whether it was a limitation or a condition.

But such is not the situation here. The question of the continuance of due diligence in the prosecution of work leading to a discovery of oil, is one which is not to be answered with reference to a specific date. You may prove with accuracy the day on which a woman ceases to be a widow, or upon which X re-

turns from Rome, and limit an estate upon the event. But due diligence is a very complex and composite proposition. It can only be determined after all of the facts, running over perhaps a very considerable period of time, have been ascertained; and when all of the facts are ascertained, the question of law remains—often a very nice one—as to whether or not these facts do or do not constitute due diligence.

The very nature of such a provision—the impossibility of ascertaining the exact date upon which the diligent prosecution of work may be said to have ceased—imperatively demands, we submit, that such a provision be construed as a condition subsequent, and not as a limitation. To what insecurity of title and possible conflict, it would lead if years after oil is discovered, and perhaps after the property has been enormously developed and has changed hands for millions of dollars, some government clerk could be deputed to make an “investigation” into the diligence of the claimant during the period between the passage of the Pickett Act and prior to a discovery of oil! And then how outrageous for the government to be in a position upon such clerk’s *ex parte* and perhaps utterly unwarranted conclusion, that the occupant had not used due diligence on a certain date years and years before, to predicate a claim that the estate had then terminated, and that from that time forth all occupants had been trespassers and guilty of a conversion of the oil extracted! The consequences to

which a particular interpretation will lead are always to be considered when the Court is in doubt on a pure question of interpretation.

"Whether the words amount to a condition, or a limitation, or a covenant, may be matter of construction, depending on the contract. . . . The distinctions on this subject are extremely subtle and artificial; and the construction of a deed, as to its operation and effect, will after all depend less upon artificial rules than upon the application of good sense and sound equity to the object and spirit of the contract in the given case."

4 *Kent's Comm.*, *133 (12th Ed.).

The following general considerations are to be noted:

"A court of equity will never lend its aid to divest an estate for the breach of a condition subsequent."

4 *Kent's Comm.* (12th Ed.), *131.

"It is usual in the grant to reserve in express terms, to the grantor and his heirs, a right of entry for the breach of the condition; *but the grantor or his heirs may enter, and take advantage of the breach, by ejectment, though there be no clause of entry.*"

ibid., *124.

Condition as to Continued Diligence is Waived if the Government Permits the Occupant to Proceed to Actual Discovery.

It is a general rule that long delay of the grantor in asserting his right, during which time the grantee goes ahead and spends money on the property and makes valuable improvements, will constitute a waiver

of the right to re-enter—or what is its equivalent—to sue in ejectment for the recovery of the property for breach of the condition.

Ludlow v. N. Y. & Harlem R. R. Co., 12 Barb., 444.

This principle is further illustrated in *Sperry's Lessee v. Pond*, 5 Ohio, 387, already quoted, where resumption of work at the grist and saw mills prior to demand or suit cured the breach.

If an occupant was not just as diligent for a time as the government now thinks he should have been, it could not sit idly by for years and years, any more than a private individual could, while a claimant continues on to discovery and expends hundreds of thousands of dollars in the expectation of obtaining title to the land.

The conclusion from this discussion, therefore, is that after there has been a discovery, it is too late for the government to step in and seek to obtain a forfeiture for breach of the condition subsequent. Even a court of law—the only court in which the question could arise—would hold the condition to have been waived.

THE FINAL CERTIFICATE ISSUED BY THE LAND OFFICE
FOR SECTION 28 BARS ALL INQUIRY INTO THE QUES-
TION OF DUE DILIGENCE ON SECTION 28.

Counsel for the government appear to have missed the entire point of our argument on this proposition.

We do not doubt that in a proper case suit may be brought by the United States to set aside a patent or to cancel a Receiver's receipt or certificate of purchase for fraud or mistake.

United States v. Minor, 114 U. S., 233.

But the point is that this is not such a suit. The complaint makes no mention of the proceedings in the Land Office or of the receiver's final receipt. There is no pleading to support such a theory. The suit was not brought on any such theory.

Plaintiff is now confronted by a final certificate of purchase issued by a department of the government having the jurisdiction to determine whether or not we were duly diligent. That certificate means that facts have been adjudged in our favor—facts which mean that to-day we have the full equitable title and that the government has no title other than a bare, naked legal title. While that certificate stands unrevoked and unassailed by direct attack, it debars the government from making an attack in this collateral way. The authorities cited in our Opening Brief make this entirely clear.

See particularly:

El Paso Brick Co. v. Knight, 233 U. S., 257;
Brown v. Gurney, 201 U. S., 193.

CONCLUSION.

Under separate cover our reply to the government's argument on "group development" has been fully briefed. To this we beg to refer the Court.

Upon the oral argument we urged the Court not only to reverse the order appointing a receiver for the lands involved in these suits, but also to order that the bills be dismissed.

That this Court may and should do this if satisfied that the government has in equity no right to this property is well settled.

Smith v. Vulcan Iron Works, 165 U. S., 518,
 525;
Mast, Foos & Co. v. Stover Mfg. Co., 177
 U. S., 485, 495.

This rule applies where the government is a party as readily as it applies in other cases.

"Though the matter is before us only upon appeal from the order granting the preliminary injunction, we might if satisfied that the government could not prevail upon the final hearing, now order that the bill be dismissed for want of equity. *Smith v. Vulcan Iron Works*, 165 U. S., 518-524, 525, 17 Sup. Ct., 407, 41 L. Ed., 810; *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U. S., 485-494, 20 Sup. Ct.,

708, 44 L. Ed., 856; *Harriman v. Northern Securities Co.*, 197 U. S., 244-287, 25 Sup. Ct., 493, 49 L. Ed., 739."

Henry Gas Co. v. United States, 191 Fed., 132,
140.

Respectfully submitted.

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APPENDIX

IN THE

United States Circuit Court of Appeals

EIGHTH CIRCUIT

No. 4704.—September Term, A. D. 1916.

United States of America,	}	Appeal from the District
Appellant,		Court of the United
vs.		States for the District
The Grass Creek Oil & Gas Com-	}	of Wyoming.
pany and The Ohio Oil Company,		
Appellees.		

This is an appeal from a decree in favor of the appellees, who were defendants in the court below.

The final hearing was on oral testimony, and the court found both issues in favor of the defendants, that of the discovery, and that the defendants on May 6, 1914, were *bona fide* occupants and claimants of these lands, in the diligent prosecution of work leading to the discovery of oil, and continuing thereafter in diligent prosecution of said work. From this decree the United States prosecutes this appeal.

Mr. F. B. Hobgood, Jr., Special Assistant to the Attorney-General (Mr. C. L. Rigdon, U. S. Attorney, was on the brief with him), for appellant.

Mr. William A. Riner (Mr. Timothy A. Burke was on the brief with him), for appellees.

Before SANBORN and CARLAND, Circuit Judges, and TRIEBER, District Judge.

TRIEBER, District Judge, delivered the opinion of the Court.

Under the issues and proofs two questions arise. First: Was there a discovery of mineral oil by the defendants or those

under whom they claim, on the lands in controversy, on or before the 6th day of May, 1914, when the withdrawal order of the lands was made by the President? Second: Were the defendants at the date of said order of withdrawal *bona fide* occupants or claimants of these lands, engaged in diligent prosecution of work leading to the discovery of oil, and continuing thereafter in diligent prosecution of said work, until oil was discovered?

In view of the conclusions reached we deem it unnecessary to determine the first issue, as a finding in favor of the defendants on either issue, must result in the affirmance of the decree. It is a well settled rule governing appellate courts, that the findings of fact by a chancellor, although not conclusive upon appeal in equity, are presumptively correct and persuasive. Unless an error has occurred in the application of the law, or a serious mistake has been made in the application of the evidence, or the finding is clearly against the weight of the evidence, such findings will not be disturbed. And this rule is especially applicable when the evidence was heard orally by the chancellor, and he thus had the opportunity to see the witnesses, observe their demeanor while testifying, judge of their candor and intelligence, and thus be able to determine their credibility and the weight to be given to their testimony. *Harrison v. Fite*, 148 Fed., 781, 78 C. C. A., 447; *Coder v. McPherson*, 152 Fed., 951, 82 C. C. A., 99; *Mastin v. Noble*, 157 Fed., 506, 85 C. C. A., 98; *Harper v. Taylor*, 193 Fed., 944, 113 C. C. A., 572; *United States v. Marshall*, 210 Fed., 595, 127 C. C. A., 231; *Tobey v. Kilbourne*, 222 Fed., 760, 138 C. C. A., 308. The new equity rules have made no change in these respects. *American Rotary Valve Co. v. Moorhead*, 226 Fed., 202, 141 C. C. A., 129.

The Act of Congress under which the withdrawal of these lands was made by the President on May 6, 1914, is known as the "Pickett Act," passed June 25, 1910, 36 St., 847, Chap. 421. That Act, so far as it applies to the issues in this case, contains the following proviso: "Provided, that the rights of any person, who at the date of any order of withdrawal heretofore or hereafter made, is the *bona fide* occupant or claimant of oil or

gas bearing lands, and who, at such date, is in diligent prosecution of work leading to the discovery of oil or gas, shall not be effected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work."

As it is claimed on behalf of the appellant that the finding of the trial judge was not warranted by the evidence, and that he committed obvious errors in the application of the law, it becomes necessary to review the evidence. As we deem it unnecessary to determine the correctness of the finding on the first issue, that of the discovery of oil in 1913, we shall confine ourselves to the statement and consideration of the evidence relating to the other issue. Most of the facts on this issue are undisputed and not questioned by either party.

As early as April, 1913, Mr. Harrison, a geologist and mining engineer, visited this section, now known as the "Grass Creek Oil Field"; that in July, 1913, he employed a civil engineer to locate the lands according to the government surveys; that thereupon he located a number of mineral claims as attorney in fact for certain parties, all of whom were qualified to make the locations, among them the lands in controversy. He placed proper location notices on the land, had the location notices properly recorded in conformity with the laws of the United States, of the State of Wyoming, and the rules of miners in that section. He established camps, and drilled for oil on these lands, continuing until September, 1913, when it is claimed oil was discovered. He thereupon sought to obtain the necessary capital to develop these locations. In April, 1914, he showed these lands to representatives of the defendant, the Ohio Oil Company, with a view of leasing them to it, indicating to them what he called the "discovery holes," which he had caused to be drilled in 1913. On April 19, 1914, he entered into an oral contract for the lease of these lands to the Ohio Oil Company, the agreement being made with Mr. McFadyen, who was field superintendent of the Ohio Oil Company. This agreement was made subject to the approval of the officers of the company. A few days thereafter, in April, 1914, this approval was obtained by telegraphic communication, whereupon Mr. McFadyen at once entered upon the lands and placed

in charge thereof, as caretaker, one Virgil Jackson, who remained on the land as the employee of the Ohio Oil Company, as caretaker from that time until after May 6, 1914. On May 4, 1914, Mr. McFadyen ordered the lumber and material which was owned by the Ohio Oil Company and suitable for developing the land for oil, which was then in the town of Casper, to be sent immediately to Kirby, which is the nearest railroad station to these lands. On May 5, 1914, Mr. Harrison returned to these lands, bringing with him tent equipments for the accommodation of the workmen, and which were immediately put up. On the same day, May 5, 1914, Mr. McFadyen for the Ohio Oil Company, entered into a verbal contract with Mr. Good, at Thermopolis, to drill wells on these lands, and to proceed at once. Mr. Good shipped the drilling tools to the land on May 9, 1914, for the purpose of doing the work, and continued uninterruptedly until October 1, 1914. He began actual drilling operations on the northwest quarter on July 1, 1914, as soon as the drilling apparatus had been erected and was in working order, finishing the well on July 24, 1914, when having drilled to a depth of 1047 feet, oil in commercial quantities was discovered. Actual drilling on the east half of the southwest quarter was begun by him on July 31, 1914, and continued until August 20, 1914, when oil was discovered in commercial quantities at the depth of 965 feet.

On May 6, 1914, Mr. Harrison found some persons on these lands, who claimed to be locators under what is known as the Worland locations, but he treated them as trespassers and compelled them to leave, which they did. In this connection it is proper to state that these Worland locators, although made parties defendant to this action, made no defense whatever, nor any claim to the lands by cross-complaint against appellees, thus abandoning any claim which they may have had to the land in controversy and by implication at least, recognizing the superior rights of the Harrison locators, under whom appellees claim. On the same day Mr. Harrison made contracts for supplies to be used in connection with the work of drilling for oil. An engineer of the Ohio Oil Company arrived on that day with a carpenter, who started the work of building the camps on

that day and continued until they were completed. Tents were also put up on that day.

In the meantime Mr. McFadyen was looking after the prompt loading and forwarding of the Ohio Company's rigs, which had been ordered to be forwarded to the land.

Prior to May 6, 1914, the Ohio Oil Company had expended in money and assumed liabilities under its contracts for work on the land, amounting to \$2000. The material and lumber for the camps arrived on May 7, 1914, and work was begun at once. On May 10, 1914, the cook house had been completed, and the car containing the equipment reached the railroad station nearest to these lands, and was placed on the siding for unloading. Knowledge of the withdrawal order did not reach the parties until May 14, or 15, 1914.

Since then the Ohio Oil Company has expended for the development of these two tracts of land large sums of money; on the northwest quarter \$11,157.92, and on the other tract \$10,152.97. Thereafter and before the institution of this suit there was spent by the Ohio Oil Company \$629.36 in operating the wells and \$15,000 for the construction of a 37,500-barrel steel storage tank. These sums do not include the expenditures made by Mr. Harrison prior to his contract with the Ohio Company.

There was evidence introduced on the part of the government that on May 5, 1914, a Mr. Walker went on the land with a party of prospectors, and he did not see any work under way, that at a few points he found some three-inch pieces of pipe and a drill hole on each of the quarters. A Mr. Orchard, another witness for the government, testified that he went on these lands March 25, 1914, and saw no improvements, except a few pieces of pipe sticking out of the ground. Mr. Valentine, another witness for the government, testified that he was on these lands on May 5, 1914, and saw no one there, but saw a piece of pipe sticking out of the ground on the southeast quarter, but nothing on the northwest quarter.

In our opinion the evidence clearly justified the finding by the chancellor, that from the time Jackson was employed and

placed on the land as caretaker for the defendant, the Ohio Oil Company was an occupant of the land.

But, it is claimed, that even if that is true, the defendant, the Ohio Oil Company, was not a *bona fide* occupant or claimant of these lands, in the diligent prosecution of work leading to the discovery of oil or gas on May 6, 1914, when the order of withdrawal was made. It is claimed that actual drilling operations were not commenced until July 1, 1914, on the northwest quarter, and on July 31, 1914, on the east half of the southwest quarter, and that until the actual drilling was begun there was no prosecution of work within the meaning of the Act of Congress. We are of the opinion that this is too narrow a view to take of this statute. The enactment of this proviso by Congress could have had but one object in view, and that was to protect the rights of all persons who at the date of an order of withdrawal, are occupying or claiming oil-bearing lands in good faith, for the purpose of acquiring them under the laws of the United States, and are diligently prosecuting the work leading to the discovery of oil. Before the enactment of this statute discovery of the mineral was essential to make a location. As frequently, in fact in most instances, prospecting was necessary in order to determine whether oil or gas are on the public lands, and large sums of money were necessarily expended to ascertain this fact, Congress by this proviso in the Act of 1910, extended its protecting arm to those acting in good faith in an effort to ascertain whether there was oil or gas under them. In our opinion when a citizen of the United States, in good faith enters upon public land for the purpose of discovering oil or gas, takes possession of the land by placing a caretaker thereon while he is taking proper steps to obtain the material necessary for the work of constructing the camps, enters into contracts for drilling, acting as expeditiously as possible, in erecting camps and preparing for the drilling, spends money and enters into contracts whereby he becomes liable for sums of money to prosecute the work leading to the discovery of oil or gas, and as soon as it is possible, by the exercise of proper diligence, begins the work of drilling and continues it diligently and expeditiously

until oil is discovered in commercial quantities, he is within the protection of this proviso. As was stated in *Borgwaldt v. McKittrick Oil Co.*, 164 Cal., 150, although that case did not involve this Act of Congress, but was a contest between claimants, "We do not mean to hold that such diligent prosecution of the work may not include such actual preparation for the same as the bringing to the claim of material necessary therefor." The learned counsel for the government in fact concedes the correctness of this proposition. In his brief he says: "It is not contended by the government that the construction of a camp might not be a part of such work, but that, unless such camp is for the purpose of furnishing a base for drilling operations upon the claims in controversy, its construction is not diligent prosecution of work, so far as the claims in controversy are concerned." The evidence clearly shows that the defendants brought themselves within this rule. Everything they did was "for the purpose of furnishing a base for drilling operations on the lands in controversy." For what other purpose did they make these expenditures, and enter into contracts for erecting the camps, and the drilling by Mr. Good?

The learned trial judge committed no error in the application of the law to the facts, as shown by the evidence, and the evidence sustains his findings beyond question.

The decree of the District Court is *Affirmed.*

Filed October 13, 1916.

A true copy.

Attest:

JOHN D. JORDAN,

Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

CONSOLIDATED MUTUAL OIL COMPANY, a
corporation, and J. M. McLEOD,
vs.
THE UNITED STATES OF AMERICA,

Appellants,
Appellee.

No. 2787

CONSOLIDATED MUTUAL OIL COMPANY, a
corporation, and J. M. McLEOD,
vs.
THE UNITED STATES OF AMERICA,

Appellants,
Appellee.

No. 2788

NORTH AMERICAN OIL CONSOLIDATED, a
corporation, et al.,
vs.
THE UNITED STATES OF AMERICA,

Appellants,
Appellee.

No. 2789

SOME SUGGESTIONS ON THE OPINION IN
UNITED STATES vs. STOCKTON MID-
WAY OIL COMPANY DELIVERED
BY HON. B. F. BLEDSOE.

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Leimert, and Wickham Havens.

Filed this.....day of February, A. D. 1917.

F. D. MONCKTON, Clerk.

By....., Deputy Clerk.

The James H. Barry Co., San Francisco.

Filed
FEB 23 1917
F. D. Monckton,
Clerk.



IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

CONSOLIDATED MUTUAL OIL COMPANY, a corporation, and J. M. McLEOD,	Appellants,	}	No. 2787
vs.			
THE UNITED STATES OF AMERICA,	Appellee.		

CONSOLIDATED MUTUAL OIL COMPANY, a corporation, and J. M. McLEOD,	Appellants,	}	No. 2788
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THE UNITED STATES OF AMERICA,	Appellee.		

NORTH AMERICAN OIL CONSOLIDATED, a corporation, et al.,	Appellants,	}	No. 2789
vs.			
THE UNITED STATES OF AMERICA,	Appellee.		

SOME SUGGESTIONS ON THE OPINION IN UNITED
STATES vs. STOCKTON MIDWAY OIL COMPANY, DE-
LIVERED BY HON. B. F. BLEDSOE.

In the case of *United States vs. Stockton Midway Oil Company, et al.*, Judge Bledsoe has just held, on facts very similar to those involved in the instant case, that the group development doctrine cannot be applied

to the Pickett Act. This conclusion would seem to follow from the holding of the court that the Pickett Act requires the work to be done "Upon the precise land which might be subject to the withdrawal order."

With all due deference for the conclusions of the learned Judge who wrote the opinion, it becomes desirable, therefore, to test the correctness of this statement that the Pickett Act requires the work to be done "upon the precise land which might be the subject of the withdrawal order."

BOTH THE DEPARTMENT OF JUSTICE AND THE LAND DEPARTMENT DISAGREE WITH JUDGE BLEDSOE.

In the first place, the Department of Justice has almost invariably conceded that this interpretation of the Act was not correct. In the hearing before the Senate Committee on Public Lands, H. R., 406, page 348, the Attorney General himself said:

"I have never held that the work counted by the Pickett Act is necessarily confined to work done within the boundaries of the tract claimed."

And so far as we can recall, the various learned Assistants to the Attorney General who have actually conducted the trial of the cases in California and Wyoming have taken the same position as their chief.

Furthermore, the Land Department is in accord with the Department of Justice on this point, and the Honorable Commissioner (Tallman) said in the Honolulu Oil Company case:

"Furthermore, I am unable to see any good and sufficient reason why such work and improvements not within the boundaries of a particular claim may not in proper cases and within certain limitations be equally considered as work leading to discovery, where such work and improvements are designed and adapted for a unit of development of several claims under a common connected system."

PHRASEOLOGY OF PICKETT ACT SHOWS INTENT OF CONGRESS TO RECOGNIZE WORK OFF OF THE CLAIM AS SUFFICIENT.

Admittedly, as stated by the learned Judge, there is no express language in the Pickett Act, requiring the work to be done upon the precise land, but we are not content to rest with this. Not only is there no such language in the Act, but the circumstances under which the Act was passed show such words were omitted *ex industria*.

If it be true that *Miller vs. Chrisman*, 160 Cal., 440, furnished the language of the Pickett Act, is it not of the greatest significance that the requirement that the claimant must "remain in possession," which is emphasized in that decision, was omitted from the Act? With the language of the decision before Congress at the time of the framing of the bill, is it not more reasonable to assume that the omission was deliberate rather than inadvertent, especially in view of the further language of the Act which protects both *occupants* and *claimants*? Had Congress intended that all work required should be

done upon the precise land, as the learned Judge states, the word "occupant" would have included every possible claimant under the protection of the Act, and the addition of the word "claimant" would have been a mere pleonasm.

The construction placed upon the Pickett Act by the Court in the Stockton Midway Oil Company case necessarily assumes that Congress did not notice the words "remains in possession" in *Miller vs. Chrisman*, and used the meaningless word "claimant" with no purpose in view.

JUDGE BLEDSOE MISCONCEIVED MEANING OF "WORK LEADING TO DISCOVERY."

In the Stockton Midway case Judge Bledsoe says:

"Confessedly, at the date of the Executive withdrawal order in 1909, no work of any kind, diligent or otherwise, leading to a discovery of oil on the Southeast Quarter of Section 14 was in progress."

If it is intended by this to intimate that the defendants conceded that no such work was in progress leading to the discovery of oil on the Southeast Quarter of Section 14, then counsel for the defendants in the Stockton Midway Oil Company case either expressed themselves most obscurely, or they have made a concession which the facts involved do not warrant.

It appeared without controversy that a well was being drilled within a few feet of the common corner

of the four quarters of Section 14 on the date of the withdrawal. The well itself was just within the boundary lines of the Southwest Quarter, and discovery therein proved the existence of oil on each of the adjoining claims, at least, where the derrick stood.

Can this Court conceive of any one link in the chain leading to discovery of greater importance than that which discloses to the searcher that the oil will be found at an indicated place? This well would show within a few feet at what depth oil would be struck on the adjoining land. It expedited the work and decreased the cost. The defendants, therefore, urge with all possible earnestness that the drilling of the well on the Southwest Quarter was work leading to the discovery of oil just across the line on the Southeast Quarter.

ERRONEOUS MEANING GIVEN TO THE WORD "LEADING" BY JUDGE BLEDSOE.

The conclusion of the learned Judge is, perhaps, attributable to his rather unusual definition of the words "leading to discovery." He defines them as meaning "To bring about discovery." We have made a careful search, and find no authority for this definition.

According to Webster and the Standard dictionary, "lead" means "to guide," "to show the way." To define these words as meaning "to bring about dis-

covery" would make the sufficiency of the work done by the operator depend on the result. The only work sufficient would be the actual drilling of a well to a discovery. The building of a camp to be used as the base of operations does not "bring about" a discovery, although the Circuit Court of Appeals of the Eighth Circuit, in the Grass Creek Oil case, held that the building of such a camp is sufficient to constitute work *leading to discovery*. A water line or a road cannot bring about discovery, although the Land Office, in the Honolulu Oil Company case, has held that it is sufficient to constitute work leading to discovery. More than this, if an operator were actually drilling a well on the withdrawal date, and afterwards were compelled to abandon it by reason of mechanical difficulties, and immediately started another well, then, under this definition, the operator was not diligently at work at the date of the withdrawal, because the first well, which never reached the oil, could certainly not be said to bring about a discovery.

In using the words "leading to discovery" in their literal significance as defined by Webster and the Standard, there is absolutely nothing that could be done outside of the drilling of the well itself which would more clearly guide or show the way to the oil than another well just across the line from the property in question.

The decision, furthermore, may be attributed to the view taken by the learned Judge that the Pickett Act

is to be construed with strictness in favor of the Government. The Pickett Act is a remedial statute, so intended, and under the general laws, all remedial statutes are to be liberally construed.

Beley vs. Napthaly, 169 U. S., 359,

construing a statute to protect equitable rights against the Government.

JUDGE BLEDSOE'S DECISION CONFLICTS WITH ESTABLISHED PRINCIPLE.

The opinion is confessedly in conflict with the whole line of mining cases, ending with *Copper Glance Lode*, 29 Land Decisions, 542, in which it has been held, without a dissenting voice, that work for the development of a mining claim may be done on one of a group of claims. In the *Copper Glance Lode* case, the Secretary of the Interior applied this ruling to an application for patent against the Government, so that the situation is precisely analogous to the case at bar. The learned Judge is of the opinion that the Department might have been too liberal in its construction of Section 2325 of the Revised Statutes in this decision. In so doing, however, the Department was following an unbroken line of authorities, and, so far as we know, the principles therein laid down have never been departed from. But whether the decision was correct or not, it has stood for over sixteen years. It affects the title to mining claims worth fabulous sums.

It has become a rule of property, and we respectfully submit, in view of well recognized rules, that the decision should not be questioned at this late date, unless it is so palpably erroneous that no other conclusion is possible.

Pennoyer vs. McConnaughy, 140 U. S., 1.

JUDGE BLEDSOE'S VIEWS CONFLICT WITH JUDGE
RINER'S.

The decision in the Stockton Midway case is also in conflict with the opinion of Judge Riner in the case of *United States vs. Grass Creek Oil Company*, and with the opinion of the Circuit Court of Appeals (236 Fed., 483) affirming Judge Riner's decision. With great deference to the views of the learned Judge, we submit that his statement that Judge Riner arrived at a contrary conclusion "without giving consideration to the precise point involved herein" is without foundation. Judge Riner sustained the position of the defendants on the group development theory as a totally separate and distinct reason from the contention that they made a discovery. Judge Riner upheld defendants on two grounds, first, that they made a discovery long before the withdrawal, and, secondly, that they were diligently at work at the time of the withdrawal, assuming that they had not made a discovery. Judge Riner's holdings on group development cannot be explained on the theory that a discovery had

been made, because if discovery had been made, no work at all was necessary, and the group development theory was not applicable.

It is also sought to distinguish Judge Riner's decision on the ground that in that case it is stated that the parties entered into an agreement to drill a well on each parcel of land, whereas, in the instant case, they bound themselves to drill a well on each parcel only in the event that oil was discovered.

To hold that an operator is not diligently at work because he has a mental reservation to discontinue it when he has once satisfied himself that there is no possibility of discovering oil simply means that there is no such thing as diligent work. All these operators are after the oil in the land, and if there is no oil, they do not want the land. Under the distinction pointed out, the defendants would be protected only if they absolutely bound themselves to drill three more wells on the other three quarters, even though the land should be proved valueless for oil by the drilling of the first well. Assuming these wells would cost from twenty to forty thousand dollars apiece, is it conceivable that Congress intended that in order to comply with the provisions of diligent operation, it was necessary for a man to bind himself by so unbusinesslike an arrangement as to actually waste from sixty to one hundred thousand dollars after ascertaining that his expenditures would be wholly futile?

IN CONCLUSION.

The conclusion to which we are forced, after a very earnest consideration of the expression that the Pickett Act requires all work to be done *on* the precise land which is the subject of withdrawal is that it is contrary to (a) the position of the Attorney General, (b) the rulings of the United States Land Office, (c) the only court decisions which have considered the subject.

Respectfully submitted.

Attorney for Appellant McLeod.

Attorneys for Appellants Consolidated Mutual Oil Company, North American Oil Consolidated, Walter P. Frick, John F. Carlston, Clarence J. Berry, Dennis Searles, Walter H. Leimert, and Wickham Havens.

IN THE
United States Circuit Court of Appeals

For the Ninth Circuit

CONSOLIDATED MUTUAL OIL COMPANY,
a corporation, and J. M. McLEOD,
Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

No. 2787.

CONSOLIDATED MUTUAL OIL COMPANY,
a corporation, and J. M. McLEOD,
Appellants,

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THE UNITED STATES OF AMERICA,
Appellee.

No. 2788.

NORTH AMERICAN OIL CONSOLIDATED,
a corporation, et al.,
Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

No. 2789.

**REPLY BRIEF FOR THE UNITED STATES OF
AMERICA.**

E. J. JUSTICE,
F. P. HOBGOOD, Jr.,
FRANK HALL,
Attorneys for Appellee.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

<hr/> <div style="display: flex; justify-content: space-between;"><div>CONSOLIDATED MUTUAL OIL COMPANY, a corporation, and J. M. McLEOD, <i>Appellants,</i></div><div style="width: 20%; text-align: right;">No. 2787.</div></div> <div style="text-align: center; margin: 5px 0;">vs.</div> <div style="display: flex; justify-content: space-between;"><div>THE UNITED STATES OF AMERICA, <i>Appellee.</i></div><div style="width: 20%;"></div></div> <hr/>		
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<hr/> <div style="display: flex; justify-content: space-between;"><div>CONSOLIDATED MUTUAL OIL COMPANY, a corporation, and J. M. McLEOD, <i>Appellants,</i></div><div style="width: 20%; text-align: right;">No. 2788.</div></div> <div style="text-align: center; margin: 5px 0;">vs.</div> <div style="display: flex; justify-content: space-between;"><div>THE UNITED STATES OF AMERICA, <i>Appellee.</i></div><div style="width: 20%;"></div></div> <hr/>		
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<hr/> <div style="display: flex; justify-content: space-between;"><div>NORTH AMERICAN OIL CONSOLIDATED, a corporation, et al., <i>Appellants,</i></div><div style="width: 20%; text-align: right;">No. 2789.</div></div> <div style="text-align: center; margin: 5px 0;">vs.</div> <div style="display: flex; justify-content: space-between;"><div>THE UNITED STATES OF AMERICA, <i>Appellee.</i></div><div style="width: 20%;"></div></div> <hr/>		
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**REPLY BRIEF FOR THE UNITED STATES OF
AMERICA.**

This reply brief is filed in answer to the contentions of counsel for the Appellants embodied in the brief entitled, "Some Suggestions on the Opinion in United States vs. Stockton Midway Oil Com-

pany, delivered by Hon. B. F. Bledsoe” and filed in causes Nos. 2787, 2788 and 2789; and the brief entitled, “Supplemental Brief Addressed to the Point That Appellants Are Entitled to a Patent Under the Act of March 2, 1911,” and filed in cause No. 2789. The questions will be discussed in the order just enumerated.

I.

Reply to “Some Suggestions on the Opinion in United States vs. Stockton Midway Oil Company, Delivered by Hon. B. F. Bledsoe.”

The criticism now made of the opinion of Judge Bledsoe is, in substance, a repetition of the argument presented upon the hearing of that case. A sufficient answer thereto is found in the opinion itself, which follows:

This is an application by the plaintiff for an injunction in restraint of waste and for the appointment of a receiver for oil property claimed by the government in its proprietary capacity, and now in the possession of and being operated for the production of oil by defendants.

The case is a so-called “withdrawal suit” and in its substantial features is of the form, scope and purpose of cases heretofore considered and reported. (*United States vs. McCutchen et al.*, 234 Fed. 702; same case on final hearing,—Fed. —; also *United States vs. Midway Northern Oil Co.*, 232 Fed. 619, heretofore heard and determined by Judge Bean sitting in this court.)

The facts of the case present no conflict. Substantially they are as follows:

The land in dispute is the southeast quarter of Section 14, Township 31 South, Range 22 East,

Mount Diablo Meridian, in the State of California. All of the four quarters of the section named were located as four placer claims at the same time and by the same persons, and of course are contiguous. Each quarter section later passed into the possession of the Bear Creek Oil and Mining Company, under which the General Petroleum Company now claims, for development purposes; previously to production of oil upon the land, it was what is known as "wild cat" territory in that it was not known to contain oil, and was not near enough to an oil territory to make the existence of oil therein reasonably probable, although its relation to other oil lands, and its geological characteristics were such as to suggest the possibility that it contained oil. The Bear Creek Oil Company concluded to explore the land for oil and in pursuance of that purpose entered into a contract with the original locators which contained the following among other stipulations:

"In consideration of said covenants on the part of the party of the first part, the party of the second part hereby agrees that it will, within twenty days after the date hereof, commence the erection on each three quarters in said section of buildings sufficient and suitable to carry on the business of drilling for oil, and an oil drilling derrick. On the remaining quarter, to complete a standard drilling rig and as soon as practical thereafter to commence the actual work of drilling the well and continuing the same with reasonable diligence *until success or abandonment, that is to say, until the territory shall have been tested for petroleum oil.* (Italics supplied.)

"After the completion of a well on the first quarter producing oil in paying quantities, the said party of the second part agrees to commence a well on one of the remaining quarter sections, and after oil shall have been discovered on the

second quarter in paying quantities, work will be commenced and prosecuted in a similar manner on each of the third and fourth quarters successively.”

Pursuant to this contract the Bear Creek Oil and Mining Company established a camp at the center of the section and erected a building or buildings on each of the four quarter sections, which were thereafter continuously occupied by its employees; a water line was run, a water tank was established on one of the quarters, a road was made, and a skeleton derrick was erected on each quarter. These improvements were made in the spring of 1909, and completed some time in June of that year.

Work on the drilling of a well on the southwest quarter and near the center of the section was begun in June, 1909, and continued until oil was discovered in the fall of 1909 and the well completed in February, 1910. The skeleton derrick on the southeast quarter, involved in this suit, was destroyed by wind in the fall of 1909, and another derrick was erected thereon during the winter following.

After the completion of the well on the southwest quarter, wells were drilled consecutively on the northwest, northeast and southeast quarters, the one on the southeast, the last to be drilled, having been spudded in in May, 1910, and later oil was discovered on that tract. On December 15, 1909, an affidavit as to the work theretofore done on the southeast quarter was filed, which said affidavit purported to recite the doing of so-called assessment work upon the claims during the year 1909 in a sum considerably in excess of the statutory requirements. Said affidavit also recited that such expenditures were made for the purpose of holding said claim, and also recited that, in addition to the labor done on said claim, the Bear Creek Oil and Mining Company was

the owner of the four claims heretofore referred to, covering the four quarters of the section above mentioned; that they lay in a contiguous compact group, and that the labor done and improvements placed upon any one of said claims tended to and did develop and determine the oil-bearing character of said contiguous claims and of each of them. Also, that upon said group of claims the owner had performed labor and made improvements of the value of not less than \$20,000.00, etc.

The lands in question were withdrawn from appropriation under the mineral land laws of the United States by the Executive withdrawal of September 27th, 1909. (See *U. S. vs. Midwest Oil Co.*, 236 U. S. 459.)

Up to the time the lands in controversy were withdrawn from appropriation, no "discovery" of any mineral had been made. The claim had been "located", that is, appropriate monuments and mineral location notice had been set up, but the *sine qua non* of a valid mineral claim, viz.: the discovery of mineral within the limits of the claim had not been accomplished. The locators, then, were in the position referred to and commented upon in *McLemore vs. Express Oil Co.*, 158 Cal. 559; 112 Pac. 59; they had acquired no permanent vested rights of any character, and in virtue of their location and occupancy of the claims had acquired merely the limited right, as against all persons save the government at least (*McLemore vs. Express Oil Co.*, *Supra*) unhindered, to engage diligently in the prosecution of work leading to a discovery of oil or other mineral content within the boundaries of the claim located.

As I was led to conclude in the *McCutchen* case, on application for a receiver, *supra*, the withdrawal order itself, by its terms, recognized and sought to protect this substantial though lim-

ited right. Express Congressional recognition of it was accorded in the Pickett Act (36 Stat. 847), which while neither acknowledging nor repudiating the validity of the withdrawal order, limited the extent to which such order might otherwise go, if valid, by protecting from withdrawal those who were at the date of withdrawal, "in the diligent prosecution of work leading to the discovery of oil or gas." In other words, by this Act Congress sought to give oil locators before discovery the same rights as against the government that judicial decisions had given them as against third persons. There is no inference to be drawn, however, that Congress, *legislating as it then was as to withdrawals and in aid of the proprietary rights of the government*, was intending to confer any additional rights, particularly as against the government, upon those claiming, without a discovery, land withdrawn by competent authority. The net result of the situation, then, was, that upon the withdrawal of the land embraced within his claim, *in the absence of a discovery*, a claimant possessed no rights at all, as against the government, save the right, if he were then actually engaged in the diligent prosecution of work leading to a discovery of oil or gas on such claim, to "continue in diligent prosecution" of such work until a discovery, as a result of such continued diligent prosecution, had been effected. By that event, of course, and not till then, his immunity as against attack by the government in its proprietary capacity would be complete. Previously to such event, and in the absence of the required diligent prosecution of work, he has no defense to the government's claims.

Confessedly, at the date of the Executive withdrawal order in 1909, no work of any kind, diligent or otherwise, *leading to a discovery of oil in the southeast quarter of Section 14*, was in progress. Diligent work, pursuant to the con-

tract hereinabove referred to, was in progress on the southwest quarter, but the most that work could "lead" to, as in fact all it did "lead" to, was a discovery with respect to the claim on such southwest quarter. A discovery of oil on the southwest quarter, no matter how persuasive as to the presence of oil in, could not validate the location on, the southeast quarter. (*Nevada Sierra Oil Co vs. Nome Oil Co.*, 98 Fed. 673; *Olive Land & Development Co. vs. Olmstead*, 103 Fed. 568.) Defendants concede this, but claim (and this is the only question in the case) that the diligent prosecution of work at the time of withdrawal on the southwest quarter, under the so-called "group development" rule, sufficed to protect, until actual discovery, the other three claims in the group.

This "group development" theory is based upon a situation well known and recognized in the mining world, to the effect that annual assessment work, if otherwise sufficient in amount, done upon one of a group of contiguous claims and calculated to aid in the development of the mineral resources of the entire group, will be accepted by the government and will suffice to hold and protect all the claims constituting the group. (2324 Rev. Stat.; *Anvil Hydraulic Co. vs. Code*, 182 Fed. 205, where a very satisfactory statement of the rule may be found.) But the inherent and fundamental weakness of the defendant's contention in this regard is that the rule of "group development" both in the statute and in the decisions, relates only to subsisting mineral claims—i. e., claims upon or within which a discovery has been made. No case to which my attention has been called and no statute or regulation of which I have knowledge makes the group development rule applicable to any claims other than those upon which annual assessment work is due, viz., claims founded upon a discovery. Prior to discovery, "assessment work" will not suffice to

hold a claim, nor will it suffice to take the place of a discovery. In its legal effect, it is "irrelevant and immaterial." (*McLemore vs. Express Oil Co., Supra.*) Nor is the Pickett Act, expressly or impliedly, a recognition of the "group development theory," as suggested by counsel for defendant. As above indicated, the Act was passed because of, and with reference to, a controversy over the status of claims *where a discovery had not been made*; it had no concern with, and is not affected by, any regulation or statute respecting the continued holding of claims already *valid in law because a discovery therein had been made*.

Counsel's argument is based upon the fact that the language of the Pickett Act does not *in express terms* demand that the "diligent prosecution of work" shall be performed *upon the claims in question*, and that in consequence, and in light of the practice and decisions respecting the doing of annual assessment work upon claims held in groups, such practice and decisions are "to be read into" the Pickett Act, and "diligent prosecution of work" adjudged accordingly. The dissimilarity of the situations, however, makes inapposite the suggestion of reading the one law into the other. The one had to do with the holding of a claim valid in law; the other had to do with the initiating of such a claim. In addition, though it may not be so phrased in express terms, the clear inference to be drawn from the Pickett Act is that Congress intended that the work therein provided for should be done upon the precise land which might be the subject of a withdrawal order. Nothing in the Act serves to indicate any other intention; the language of the decisions furnishing the inspiration as well as the wording of the Act (*Miller vs. Chrisman*, 140 Cal. 440; *McLemore vs. Express Oil Co.*, 158 Cal. 559; *Borgwardt vs. McKittrick Oil Co.*, 164 Cal. 650), lends countenance to no such suggestion as

is advanced herein; and, finally, the language of the Act itself is inconsistent with such a conclusion. It provides, that if a *bona fide* occupant or claimant is in "diligent prosecution of work *leading* to the discovery of oil or gas" he shall not be affected by the withdrawal order. Obviously, the work which will avoid withdrawal must be work which, if persisted in, will "lead" to, i. e., bring about, a discovery of mineral upon the precise land withdrawn. No other land was in contemplation; on no other land could a discovery be made which would be productive of any mineral rights in or to the land withdrawn.

The argument is also advanced that, though Sec. 2325, Revised Statutes, permits the issuance of a patent as for mineral land only in case \$500.00 worth of labor "upon the claim" has been performed, yet nevertheless the Land Department has consistently applied the "Group Development" rule to application for patent, and has in consequence directed issuance of patents where the work was not done "upon the claim" but only upon one of a group of claims. (Copper Glance Lode, 29 L. D. 542; Zephyr and other claims, 20 L. D., 510.) With this premise, the conclusion is urged that the ruling of the Court in its consideration of the Pickett Act should be along similar lines. Aside from the obvious fact that a different rule of construction might reasonably be followed as between Sec. 2325, in which the government is asserting and seeking to enforce no proprietary right, and the Pickett Act, in which such right is asserted and dealt with, it would seem to suffice to suggest that under Sec. 2324 of the Revised Statutes, where the group development rule received its first recognition, by the doing of assessment work pursuant to such rule, the one substantial right in connection with mineral land, viz., the right to hold and work the claims, even as against the government, was secured. Such being the case, it was perhaps not

improper, and in furtherance of the liberal construction of mining laws in aid of mineral development, that the Department should consider that a vested right even as against the government having been thus acquired, a patent which is merely evidentiary of that right should follow, even though express authorization of such patent, based upon group development work, was lacking in Sec. 2325. It might be that the Department was too liberal in its construction of Sec. 2325. However, nothing in aid of a proper construction of the Pickett Act where the rules are to be applied with strictness in favor of the government is to be gleaned, in my judgment, from the Department's construction of Sec. 2325.

The decision of Judge Riner of the District Court of Wyoming, in *United States vs. Ohio Oil Company*, not as yet reported, is cited in support of defendant's contention. True it is, in that case, that Judge Riner, apparently without giving consideration to the precise point involved herein, did hold that work done apparently on one or more claims for the benefit of several would redound to the benefit of the claimant and suffice, as against the provisions of the Pickett Act, to vest him with a valid title to the land as mineral land with respect to all of the claims. Preliminarily, it should be observed that with respect to the claims in question Judge Riner had found that a sufficient "discovery" in law had been made; for the holding of the claims thereafter, of course, the "group development" rule adverted to by Judge Riner was applicable and proper; moreover it is apparent from the facts in that case that the contract entered into previously to the withdrawal order provided for the drilling of wells "on these lands". It would seem therefore as if in that case there was a *positive agreement* to prosecute work by the drilling of wells *upon each one* of the claims in question; such might properly have been held by Judge

Riner to have been the diligent prosecution of work with respect to all of the claims at the time of the withdrawal order. In the case at bar, however, it is apparent from the terms of the contract entered into that in the event of the failure to discover oil on one of the claims, no wells would have been drilled upon the others: in consequence *there was no positive obligation* to do anything on the southeast quarter at the time the withdrawal order was promulgated; as a necessary result thereof, there was no diligent prosecution of work at the time with respect to such southeast quarter. Irrespective of what the conclusion may have been in the Ohio Oil case then, the case at bar is clearly differentiated from that case, and not within either the spirit or scope of its ruling.

In addition, it may be said that to hold that one may acquire rights as against the government, in the face of a withdrawal order, merely by holding the "group development" rule, prosecuting his work upon several claims in succession, but always one at a time, is to go counter to the holding in *Borgwordt vs. McKittrick Oil Co., supra*. There it was sought to engraft upon the rule requiring diligent prosecution of work leading to a discovery, the qualification that it might be engaged in within a "reasonable time" after location. This qualification was expressly repudiated by the Court, it being said (p. 661): "The rule declared by the decisions does not so provide. The attempting locator's possession is protected only while he may fairly be held to be actually engaged in such work as may reasonably be held to be discovery work." So here, if *actually engaging* in the diligent prosecution of work leading to discovery is essential, the putting off of that work with respect to one claim while another claim was being explored for purposes of discovery, would seem to be destructive of the right of the claimant to be protected in his

claims upon which no work was actually being done.

The lands in controversy having been withdrawn before discovery, and no diligent work leading to such discovery having been in progress at the date of withdrawal, it follows that defendants show no such right to the lands as to negative the probability of the government's success on final hearing.

The motion for injunction and Receiver applied for will therefore be granted. Counsel will draft appropriate decrees.

Counsel invoke the rule of *stare decisis* and say that Judge Bledsoe's opinion conflicts with the principle established by the decision in *Copper Glance Lode*, 29 L. D. 542, and preceding cases enunciating the same rule. The contention is based solely upon the same erroneous conception of the question involved. Judge Bledsoe very clearly points out the distinction between the points involved in the two cases. The *Copper Glance Lode* case raised the question as to whether development work done off of a claim already validated by requisite discovery, would support an application for patent. In that case the lands embraced within the claims and locations had been segregated from the public domain and a valid right thereto had become vested in the claimants by discovery. Claimants were seeking a patent under Sec. 2325 of the Revised Statutes, and not attempting to create a vested right under Sections 2319-20, which clearly say that there can be no valid claim without discovery within its own boundaries. In the cited case the doctrine of "group

development'' was invoked to perpetuate a claim already alive, while in the instant case they are attempting to call to their aid the same doctrine to create a claim, or right, which has no existence. Those situations are entirely different and the law governing the creation of a claim and the law perpetuating a valid claim are so dissimilar that the principles governing the former have no application to the latter. This distinction, we think, was clearly and conclusively pointed out by Judge Bledsoe, and needs no further comment.

Counsel criticize that portion of Judge Bledsoe's opinion wherein he distinguishes the case under consideration from the opinion of Judge Riner in the suit of the *United States vs. Grass Creek Oil and Gas Company*, and say that both Judge Riner and the Circuit Court of Appeals determined that the group development theory as urged by counsel in the instant case was approved. The opinion of the Circuit Court of Appeals is published in 236 Federal Reporter, page 481. A most casual examination of this opinion discloses that the Court of Appeals did not consider the group development theory in reaching its conclusion, but decided the case upon the evidence showing that prior to and after the withdrawal order there in question the claimants of the property and their predecessors in interest were in diligent prosecution of work leading to the discovery of oil upon each of the claims embracing the land in question. In reading this opinion it will be remembered that the withdrawal order there

under consideration was dated May 6, 1914. On page 485 of the Federal Reporter, the Circuit Court of Appeals said:

“On the same day, May 5, 1914, Mr. McFadyen, for the Ohio Oil Company, entered into a verbal contract with Mr. Good at Thermopolis to drill wells *on these lands* and to proceed *at once*. Mr. Good shipped the drilling tools to the land on May 9, 1914, for the purpose of doing the work, and *continued uninterruptedly until October 1, 1914*. He began actual drilling operations on the northwest quarter on July 1, 1914, as soon as the drilling apparatus had been erected and was in working order, finishing the well on July 24, 1914, when, having drilled to a depth of 1047 feet, oil in commercial quantities was discovered. Actual drilling on the east half of the southwest quarter was begun by him on July 31, 1914, and continued until August 20, 1914, when oil was discovered in commercial quantities at the depth of 965 feet.” (Italics supplied.)

The language of the Court just quoted leads to the irresistible conclusion that the court found from the evidence that Mr. Good shipped the drilling tools to the land on May 9th, 1914, for the purpose of *doing the work, and continued uninterruptedly until October 1st, 1914*, and not only was this uninterrupted work proceeding on the lands in controversy between May 9th, 1914, and October 1st, 1914, but actual drilling on the east half of the southwest quarter, the land then under discussion, was begun by him on July 31st, 1914. An examination of the facts as found by the Appellate Court in the Grass Creek Oil and Gas Company case discloses

that the court could not have been considering the group development theory, because it found that the work was going on continuously on each of the claims embraced in the lands in controversy. They were not seeking to apply the work done upon some other quarter section of land to the lands under consideration, and they did not find that work done upon some other quarter section of land was at all considered as work leading to the discovery of oil on the lands in controversy.

The language of the Court of Appeals above quoted necessarily impels the conclusion that during the period of time from May 9th, 1914, to July 31st, 1914, the actual work of erecting the drilling apparatus and getting it in working order was being carried on not only on the adjoining lands, but on both tracts of land involved in suit.

Another distinction which we wish to impress upon this Court is that in one of the cases at bar the record (Suit No. 2788, pages 90-96), discloses that the contract by which the drilling was to be done provided that the drilling should be commenced on the southwest quarter of the section which is not involved in suit. Under the contract there was no agreement to do drilling upon the lands in suit until after oil was discovered in paying quantities on the southwest quarter; whereas, in the Grass Creek Oil and Gas Company case, the Court found as a matter of fact that the contract entered into on the day prior to the order of the withdrawal

bound both the Ohio Oil Company and Mr. Good, the driller, to proceed expeditiously with the drilling upon each of the tracts involved. The language found on page 485 of the opinion, to wit: "To drill wells on these lands and to proceed at once," shows that the contractor was bound by his contract to drill wells upon every tract of land involved in that suit, and that the Ohio Oil Company was bound to pay for them, whereas in the case at bar we find that the contractor was only bound to drill upon the southwest quarter, and that the contract clearly evidenced the intention upon the part of defendants not to pursue their drilling on the lands involved in this suit, in the event that the well which was started on the southwest quarter of the section failed to disclose oil.

Some exception is also taken to the portion of the opinion under consideration where counsel attempt to point out the variance between the views of Judge Bledsoe and the views of the Attorney General and the Department of the Interior with respect to the place where the work in question may be done. By quoting only part of a sentence, counsel build up a man of straw, and say that Judge Bledsoe has determined that the work must be done "upon the precise land which might be subject to the withdrawal order." A fair reading and interpretation of the entire decision by Judge Bledsoe will disclose no such conclusion. It is apparent, when he used this language in a portion of one of his sentences, that he was indicating his opinion that

work which was done upon one tract of land and would only lead to the discovery of oil upon the particular tract upon which it was performed, could not be applied as work leading to the discovery of oil upon an entirely separate and distinct tract.

To illustrate the case at bar, Judge Bledsoe has said that the drilling of an oil well on the southwest quarter of the section could not be counted as work leading to the discovery of oil upon the southeast quarter of the section. He did not say that if the defendants in this case were in the actual work of laying a pipe line for the purpose of conducting water from the Stratton Water Company to the southeast quarter and had not yet arrived with that pipe line within the boundaries of the southeast quarter, that such work could not be counted diligent prosecution of work leading to the discovery of oil on the southeast quarter. The position taken by the Department and the Attorney General is that the drilling of an oil well on one quarter section of land was not work that was applicable to the other quarter, but that if a pipe line was being laid from a point without the boundaries of a quarter section of land to that particular quarter for the purpose of furnishing water with which to drill, that that work, even though without the boundaries of the particular lands, might be considered as work done upon that particular quarter, and a correct analysis of Judge Bledsoe's reasoning is not in conflict with this view.

II.

Reply to the Contention That Appellants Are Entitled to a Patent Under the Act of March 2, 1911.

This Court is asked to decide that the Act of March 2, 1911, by implication, repealed the provisions of the Pickett Act of June 25, 1910, in so far as the latter conferred rights upon those who were in the diligent prosecution of work leading to the discovery of oil or gas upon lands withdrawn from entry by the order of September 27, 1909, and, in effect, conferred rights upon those who were in the possession of land at the date of the withdrawal and had commenced some sort of development work thereon, providing such persons claimed said lands under an assignment and had made a discovery of oil or gas prior to the passage of the Act. To adopt such an interpretation would do great violence to the general mining laws as well as to the acts dealing solely with withdrawn oil lands. It is clear that the only class of claimants dealt with in the Act of March 2, 1911, are those to whom the lands applied for were transferred after the making of the paper locations and before the discovery of oil. The interpretation contended for does not authorize the patenting of lands to those who have not sold or transferred their rights in these so-called paper locations, but remands them to the continued diligence required by the Pickett Act. Neither does the Act, as counsel would have it interpreted, give any rights to assignees who had not discovered oil prior to the passage of the Act, even though they

had been diligent, for counsel would have its benefits limited to those "who shall have effected an actual discovery of oil or gas." The Act as thus applied would likewise dispense with the requirements of the general mining laws as to the quantity or value of the work required before patent and permit the issuance of a patent even though the discovery of oil or gas had been effected prior to March 2, 1911, by the expenditure of an amount of labor merely nominal in quantity or value.

The argument presented is most unique. By citation of authority they establish a rule of interpretation only invoked where light is sought upon extremely doubtful or ambiguous language, and then, boldly disregarding the rule, read into the body of the Act their own readjustment of the words of the title. We concede that in cases of extreme doubt or ambiguity courts will occasionally refer to the title of an act to determine the intent of the Legislature, but never to add to or take from the body of the statute. In counsel's argument they do not ask this Court to look to the title in order to determine the construction of the Act or the intent of Congress, but read into the Act words taken from the title for the purpose of giving to their clients a right admittedly not embraced within the body of the Act. The rule as to what bearing a title may have upon the body of the act has been well expressed by the Supreme Court in the case of *Hadden vs. Barney*, 72 U. S., 3 Wall., 107, as follows, pages 110, 111:

"The title of an act furnishes little aid in the

construction of its provisions. Originally in the English courts the title was held to be no part of the act; 'No more,' says Lord Holt, 'than the title of a book is part of the book.' *Mills vs. Wilkins*, 6 Mod. 62. It was generally framed by the clerk of the House of Parliament, where the act originated, and was intended only as a means of convenient reference. At the present day the title constitutes a part of the act, but it is still considered as only a formal part; it cannot be used to extend or to restrain any positive provisions contained in the body of the act. It is only when the meaning of these is doubtful that resort may be had to the title, and even then it has little weight. It is seldom the subject of special consideration by the legislature.

"These observations apply with special force to acts of Congress. Everyone who has had occasion to examine them has found the most incongruous provisions, having no reference to the matter specified in the title. Thus, the law regulating appeals, in Mexican land cases, to the district courts of the United States from the board of commissioners, created under the Act of March 3rd, 1851, is found in an Act entitled 'An Act Making Appropriations for the Civil and Diplomatic Expenses of the Government for the Year Ending June 30th, 1853, and for Other Purposes.' Act, June 30, 1853, ch. 108 (10 Stat. 98). The law declaring that in the courts of the United States there shall be no exclusion of any witness on account of color, nor in civil actions when he is a party to or interested in the issue tried, is contained in a proviso to a section in the appropriation act of 1864, the section itself directing an appropriation for detecting and punishing the counterfeiting of the securities and coin of the United States. Act, July 2, 1864, ch. 210 (13 Stat. 351).

"During the past session, whilst a bill was pending before Congress entitled 'A Bill Grant-

ing the Right of Way to Ditch and Canal Owners over the Public Lands, and for Other Purposes,' all after the enacting clause was stricken out, and provisions establishing a complete system for the possession and sale of interests in mines were substituted in its place. And thus the most important act in our legislation relating to the mining interests of the country stands on the statute book under a title purporting that the act grants a right of way to ditch and canal owners over the public lands, and for other purposes. Act, July 6, 1866, ch. 262 (14 Stat. 251). The words 'for other purposes' frequently added to the title in acts of Congress are considered as covering every possible subject of legislation."

See also:

Church of the Holy Trinity vs. United States,
143 U. S., 457, 462.

Looking to the language of the Act itself, it is clear that Congress had in mind but one right which it intended to confer upon one class of applicants for mining patents, namely, the right to a patent to mining land the title to which had been conveyed to the claimant by the original locator prior to the time that such location was validated by discovery. Such intention is, we submit, expressed in clear and concise language, for the Act declares its sole purpose to be "that in no case shall patent be denied to or for any lands heretofore located or claimed under the mining laws of the United States containing petroleum, mineral oil, or gas, solely because of any transfer or assignment thereof or of any interests or interest therein by the original lo-

cator or locators, or any of them, to any qualified persons or person, or corporation, prior to discovery of oil or gas therein.”

Recourse is had to the so-called history of the proviso and its amendment to uphold the position that the Act was intended to relieve assignees of original locators from the provisions of the Pickett Act requiring diligent prosecution of work leading to the discovery of oil. An examination of this history discloses no such purpose. As the bill was presented in the House (C. R. (House) Vol. 46, Part 3, page 2094), the proviso read as follows:

“Provided, however, That such lands were not at the time of entry into possession thereof covered by any withdrawal.”

The proviso as finally enacted is as follows:

“Provided, however, That such lands were not at the time of inception of development on or under such claim withdrawn from mineral entry.”

The proviso was amended in the Senate and as there amended was finally passed. The debates in the House and Senate, as hereinafter set forth, disclose that the purpose of the amendment was primarily to cause the Act to affect only those lands withdrawn from “*mineral entry.*” The proviso as it passed the House originally affected lands that had been withdrawn from all forms of entry. Debate discloses that it was the intention of Congress to exclude from the effects of the Act those lands which

had been withdrawn and established into forest reservations and other reservations of that character. That such was the intention is clearly shown by the debate in the House. (C. R. (House), Vol. 46, Part 4, page 3618.) The correspondence between the Secretary of the Interior and the Senate Committee on Public Lands discloses no intention on the part of the former nor on the part of Congress to relieve claimants of withdrawn oil lands from the provisions of the Pickett Act.

The sole purpose in enacting this statute was to relieve assignees from the rule laid down by the Interior Department in the case of H. H. Yard, et al., 38 L. D., 59. Such purpose was expressly and repeatedly declared as the only purpose by the supporters of the bill in both the House and the Senate. We quote all of the debate in Congress as follows:

EXTRACT FROM CONGRESSIONAL RECORD—HOUSE.

61st Congress, Third Session.
Pages 2094 to 2097, inclusive.

TO PROTECT LOCATORS OF OIL AND GAS LANDS, ETC.

Mr. Smith of California: Mr. Speaker, I move to suspend the rules and pass the bill H. R. 32344.

The Speaker: The gentleman from California moves to suspend the rules and pass the bill indicated. The clerk will report the bill.

The clerk read as follows:

A bill (H. R. 32344) to protect the locators in good faith of oil and gas lands who shall have

effected an actual discovery of oil or gas on the public lands of the United States, or their successors in interest.

Be it enacted, etc., That in no case shall patent be denied to or for any lands heretofore located or claimed under the mining laws of the United States containing petroleum, mineral oil, or gas solely because of any transfer or assignment thereof or of any interest or interests therein by the original locator or locators, or any of them, to any qualified persons or person, or to a corporation, prior to discovery of oil or gas therein, but if such claim is in all other respects valid and regular, patent therefor not exceeding 160 acres in any one claim shall issue to the holder or holders thereof, as in other cases: *Provided, however,* That such lands were not at the time of entry into possession thereof covered by any withdrawal.

The Speaker: The Chair understands the gentleman to move to agree to the amendment contained in the bill and to pass the bill as amended. Is a second demanded?

Mr. Mann: Mr. Speaker, I demand a second.

Mr. Smith of California: Mr. Speaker, I ask unanimous consent that a second may be considered as ordered.

The Speaker: Is there objection? (After a pause.) The Chair hears none. The gentleman from California (Mr. Smith) is entitled to 20 minutes and the gentleman from Illinois (Mr. Mann) to 20 minutes.

Mr. Smith of California: Mr. Speaker, I do not care to occupy the time in discussing the bill other than is stated in the report, unless there are questions which the gentleman desires to propound.

Mr. Mann: If the gentleman does not wish to occupy time in the discussion of the bill, neither do I.

Mr. Smith of California: Then, Mr. Speaker, I call for a vote.

Mr. James: I think the gentleman ought to explain the bill.

Mr. Mann: We can pass a pig in poke here, I believe, under suspension of the rules.

Mr. Smith of California: I thought perhaps the gentleman had read the report, which, I think, states the case fully. In a nutshell, the bill provides for the relief of those who made placer-mining entries, and conveyed them to a corporation or to another party before the discovery of the metal. Now, that practice was followed for a number of years and finally it was stated before the Interior Department, and upon a thorough and careful examination of the law the Interior Department was obliged to conclude that if the conveyance was made before discovery it conveyed nothing, and therefore the grantee had taken nothing from the grantor and could not proceed to patent. Now, the Department heartily recommends this relief for those who made these conveyances before the new ruling on the law.

Mr. James: Will the gentleman permit a question?

Mr. Smith of California: Certainly.

Mr. James: It has always been the law, though, that the locator had to be in good faith and had taken the land for his own use.

Mr. Smith of California: Not necessarily for his own use in mining cases; they were always subject to conveyance before patent.

Mr. James: But I understand that must be the original purpose when he lays claim to the land.

Mr. Smith of California: Yes.

Mr. James: Now, under this bill which the gentleman has before the House these persons

who have gone and made these locations would be denied under the law a patent to land from the Government because they had deeded or contracted to deed that property to corporations. This would give the corporations the right, or rather the men the right, to have this land patented, which in effect would go into the hands of corporations.

Mr. Smith of California: No; it does not give the right to the corporations. I will ask the gentleman from Wyoming (Mr. Mondell) to explain this.

Mr. Mondell: I will say to the gentleman from Kentucky the mining laws are peculiar and differ from all other land laws of the United States in this, that the locator of a mining claim—not a coal claim, but a mining claim—has the right to transfer it at any time. He can agree to transfer even before he makes the location. The difficulty in these cases, however, is this: That the legal initiation of a mining claim depends upon a discovery of mineral, and in case the land contains oil or gas the oil or gas lies at such a depth that the discovery cannot ordinarily be made at the time the locator goes upon the land. It requires deep drilling to make the discovery. Now, if the discovery were made, the locator could transfer to a corporation, or various locators could form a corporation, and it would be entirely regular; but in the *Yard* decision, rendered a few days ago, the Department held if the transfer was made prior to the actual discovery it amounted to an abandonment, and that therefore even the locators themselves, though they still retained their interest, if that interest was in the form of an interest in a corporation could not obtain title to the land.

Now, ever since the placer law has been applied to oil and gas lands the Department has paid no attention to the question of when the discovery

was made, but in the recent Yard decision they said the discovery must be made prior to a transfer. The Department, however, saw that the effect of that decision would be to practically nullify a large number of locations that had been made, and so suggested that we provide that as to locations heretofore made they should be relieved from the effect of the Yard decision, and, if in all other respects the claim is regular, it should go to patent.

Mr. James: Will the gentleman yield?

Mr. Mondell: I will be glad to do so.

Mr. James: What corporation is this bill primarily introduced for?

Mr. Mondell: This is practically intended to relieve every oil locator in the United States. I have had some knowledge of the way in which oil locations are made, and I think there are very few cases where the original locators, all of them, as individuals, hold their rights as individuals at the time when the discovery is made, because even though all the original locators retain their interests, they ordinarily retain them in the form of a corporation, because the sinking of a well is a very expensive procedure, and the ordinary individual or co-partnership cannot raise the money to carry on the work.

Mr. Robinson: Will the gentleman yield?

Mr. Mondell: In just a moment. So it is intended to relieve the great majority of the oil and gas locators in the United States, and the Department was so impressed with the fact that this was practically the universal practice under the placer laws as related to oil and gas lands, that they recommended they be relieved.

Mr. James: If this law does become effective, the result will be that inasmuch as the Government heretofore provided a citizen could only take up 160 acres of land, it will practically

lodge into the hands of corporations many times 160 acres of land?

Mr. Mondell: I will say to the gentleman, it does not affect the mining law in any respect whatever, except that in passing upon the validity of claims the question as to when the discovery is made, whether it was made by the original locator or made by his grantees, shall not be raised, and it has never been raised in all the history of our Government until the Yard decision a few days ago.

Mr. Robinson: Will the gentleman from Wyoming yield to me to make a statement?

Mr. Mondell: I will be glad to yield to the gentleman to make a statement.

Mr. Smith of California: I will yield to the gentleman from Arkansas (Mr. Robinson) five minutes.

Mr. Robinson: Mr. Speaker, this measure has received very careful consideration by the Committee on the Public Lands. The situation existing in the oil-producing sections of the State of California, especially with regard to oil and gas lands, demands that some such legislation be enacted. The statutes that relate to oil and gas lands permit, briefly stating it, persons to enter 20 acres each, and as many as eight persons to combine their interests. The sole purpose of this bill is to give relief in a class of cases which, in my judgment, are meritorious. It developed in the very extensive hearings had by that committee that in the operations that have occurred, especially in the State of California, it has been necessary for persons to combine their interests, under the statute, in order that capital may be secured to prosecute discoveries and to operate with after discovery. The bill is intended to permit parties to secure patents where the transfers were made prior to discovery, the decision in the Yard case, which has been applied to oil and gas

lands by the Department of the Interior, holding that where the transfer was made before the discovery of oil only 20 acres should be patented. It does not in any other respect change the statute.

The hearings developed the fact that the conditions require that some speedy relief be granted, and I sincerely hope that the bill made be passed.

Mr. Martin of South Dakota: Are there conflicting claims to any portions of the land that would be affected by this legislation?

Mr. Robinson: Not that I know of.

Mr. Martin of South Dakota: Is any portion of these lands affected by the withdrawal of June, 1910, referred to in the report?

Mr. Robinson: The amendment which the committee adopts provides that such lands were not at the time of entry into possession covered by any withdrawal. This bill does not affect withdrawals.

Mr. Martin of South Dakota: Yes; but has the withdrawal been made since the transfer of the claim and before discovery?

Mr. Robinson: I did not hear distinctly the gentleman's question.

Mr. Martin of South Dakota: I am unable to quite understand the purpose of this legislation. For instance, a location, we will say, is transferred before the discovery is made. If the transferee proceeds and makes a discovery, there is a way for him to proceed.

Mr. Robinson: He could not get a patent under the decision in the Yard case for more than 20 acres. This will permit him to get a patent to 160 acres.

Mr. Martin of South Dakota: Yes; but the statute now permits a consolidation to be made to

an amount of 160 acres, but the departmental construction denies patent where the transfer was made before the discovery.

Mr. Martin of South Dakota: The purpose is to allow the transferee to obtain title to 160 acres, whereas the original locator, if it had been held in the hands of the original locator, could not obtain but 20 acres.

Mr. Robinson: They could obtain title to 160 acres, provided the discovery had been made before the consolidation.

Mr. Martin of South Dakota: But the discovery was made afterwards.

Mr. Robinson: Then they could only get 20 acres.

Mr. Foster of Illinois: Will the gentleman yield to me?

Mr. Robinson: Certainly.

Mr. Foster of Illinois: Why is it necessary to secure more than 20 acres?

Mr. Robinson: That is a pertinent question, and that was entered into fully in the hearings before the committee. It developed there, and, I think, to the satisfaction of everybody, that it was necessary in order to secure sufficient capital. The investment required for sinking oil wells in the California fields and for the operation of them is very large. It has been disclosed by the hearings that as much as half a million dollars in a single plant was in some instances invested before oil was found, and it is considered necessary, and, in fact, the statute recognizes it by permitting the consolidation of as many as eight entries, to combine the 20-acre holdings for operation.

Mr. Smith of California: I hope the gentleman on the other side will use a portion of his time.

Mr. Mann: I yield to the gentleman from Illinois (Mr. Foster) five minutes.

Mr. Foster of Illinois: Mr. Speaker, I would like to ask this question: The gentleman from Arkansas claims that it is necessary to have a larger amount than 20 acres of ground for oil purposes?

Mr. Robinson: That is the unanimous statement of men engaged in the operation of oil claims. I want to say that the law now in existence recognizes that fact, because it permits as many as eight separate claims to be consolidated. That is a distinct recognition of the fact. If they had made the discovery before the transfer, the patent would have been permitted, but since the discovery was not made before the transfer, the patent is not permitted to more than 20 acres, notwithstanding discoveries have since been made.

Mr. Foster of Illinois: Suppose eight men each have 20 acres of ground and there is oil under it, it is not necessary for those eight men to consolidate in order to lease or do the drilling. The fact is that ninety-nine out of every hundred, I might say, almost universally, men who own land that has oil under it do not develop that land themselves, but lease it to some company, who takes the contract and pays them a royalty. So I am unable to understand, under these conditions as they exist, wherever oil is found in the United States, why it is necessary that they should consolidate and have 160 acres, except that it gives some individuals more territory to drill on; not that they would use it themselves, but that each one of them leases to some party who does the developing.

Mr. Parsons: They have nothing to lease until they get a patent to it. This is to give them a patent.

Mr. Craig: Will the gentleman from Illinois yield?

Mr. Foster of Illinois: Yes.

Mr. Craig: The gentleman from Illinois assumes that there is oil on the 20 acres, but, as a matter of fact, the men who are affected by this legislation are mere prospectors. They do not know whether there is oil under the 20 acres or not, or whether there is oil under the 160 acres. They go and drill; they drill a hole here and a hole yonder, and spend perhaps \$20,000 or \$30,000 and get nothing, and under the law as it stands today they have no right to transfer—

Mr. Foster of Illinois: I would like to ask the gentleman this question: In case they find oil on the Government land, do they pay a royalty to the Government?

Mr. Craig: In case they find oil, they get their patent under the law, but nobody gets any rights under the mining law until the discovery is made, and the discovery of oil is not made until it comes up out of the ground.

Mr. Foster of Illinois: This proposition exists wherever you find oil, that a man goes out and leases land and takes his chances as to whether he finds oil or not, and if he finds oil, then his lease is worth something, but it is not worth a dollar until he does find it, if it is on private land. Now, I have seen a little something of this myself, and I know it is said here that men spend \$20,000 or \$30,000, but that does not make any difference, whether on Government or private land, because the same thing is done on private land in every oil field in the United States.

Mr. Parsons: Will the gentleman yield for a question?

Mr. Foster of Illinois: Yes.

Mr. Parsons: Has not the gentleman the situation in mind where the oil underlies private

land and in such cases cannot a corporation do the drilling so as to make the discovery?

Mr. Foster of Illinois: Well, they do it under the Government land in the same way.

Mr. Parsons: They do not; and that is just the difficulty.

Mr. Foster of Illinois: When they find the oil, then they get the patent.

Mr. Parsons: If you want to raise money and do it in the form of a corporation, you cannot do it now unless you pass this bill, because your chief expenditure is your initial expenditure of drilling your well.

Mr. Foster of Illinois: You would meet that difficulty any place, whether on public or private land.

Mr. Parsons: On private land people can combine in the form of a corporation and spend the money of the corporation in drilling the land, but as the law now is, under this provision referred to, that cannot be done on Government land.

The result is that lots of people, not knowing that that was the law because there had never been a ruling on it, as the papers did not show whether there had been a transfer before its discovery or not, and so this decision came only recently—lots of people who wished to discover oil and wished on Government land to make use of the means of raising money that they would in discovering oil on private land, after they made their locations by having a corporation drill and then discover oil, found that the law did not allow that. It is to allow them after they have made their locations to combine together and raise their money and make their discoveries.

Mr. Speaker: The time of the gentleman has expired.

Mr. Foster of Illinois: Does that apply to all lands?

Mr. Parsons: Government lands everywhere—California, Idaho, Wyoming, Oklahoma, Colorado—everywhere.

Mr. Mann: Mr. Speaker, I yield five minutes to the gentleman from Kentucky, Mr. James.

Mr. James: Mr. Speaker, my objection to this bill is simply this: The Congress of the United States has made certain laws relative to the patenting of coal and mineral lands. Now, it seems as if every time a corporation gets hold of some of this land and finds out that in order to make its title secure it has to violate the law; they come to Congress and tell us to repeal the law that they have to violate in order to get possession of the land that the ordinary fellow down in my country or anywhere else in the United States is denied the right to title by the Government for the very same reason that the corporation was denied the right and title to that land. The ordinary citizen bows obediently to the law; the corporation or syndicate says repeal it; get it out of the way.

The corporation goes and gets possession of land. They find out that in order to make their title secure they will have to remove a law made and passed by Congress which is in their way. Then they come to Congress and ask us to repeal the law. I believe that every law placed upon the statute books ought to stand there against every applicant, big and little, corporation or private individual, every man alike. Every man should stand upon the same footing; all should look alike and be treated alike.

Now, you take the Cunningham coal claims. There are many men who have gone to Alaska, some of them poor men. They have made claims there under the law. The law has denied those poor men the right to the land, but along comes

a mighty syndicate with millions like that back of the Cunningham claims, and it finds in its way the same law the poor man found in his way, but not like the poor man do they bow to it, but they come and ask us to repeal it, and let them get it out of their way so that they can get the land. (Applause.) I do not know anything particular about this bill here except what is shown by the report on it, but if the men who deeded this oil land to the corporation could not, as the Department said, deed something that they did not then own and did not know of this law and it denied to the ordinary man the right to a patent to that land, the same law denied this corporation the right to a patent to the land. If laws are bad ones, repeal them, so that all may benefit by the repeal, but do not enter into the practice of repealing laws for the favored ones.

Mr. Smith of California: Will the gentleman permit a question?

Mr. James: Yes.

Mr. Smith of California: Does the gentleman not know, as a matter of fact, 10, 12, or 15 years, the Government did not give a patent to these corporations and individuals who held guarantees before discovery, and that practice was universal?

Mr. James: The gentleman has asked me a question, and I will try to answer it. All I know is this, that we find the gentlemen who compose a corporation for whom this bill is primarily intended find a law standing in their way that prevents them from getting a title to the public land. That is the same law that applies to every individual in the United States, and I am opposed to making flesh of one and fowl of another. (Applause.) If you are going to make these laws liberal, so every man can get part of the spoils; then make it that way, but do not make it one way, and then when the poor man runs up on it

he has to lay down, and when the rich man or corporation runs up on it they proceed to ask Congress to repeal it.

Mr. Parsons: This is primarily on behalf of the poor man, because the poor men have to combine to get the money.

Mr. James: I doubt that exceedingly; but whatever the facts, I am opposing the repeal of law for some and the enforcement of it against others.

Mr. Mann: Mr. Speaker, I yield five minutes to the gentleman from Wisconsin (Mr. Lenroot).

Mr. Lenroot: Mr. Speaker, I would like to ask the gentleman from Wyoming one or two questions. The first is in regard to proposed amendment:

Provided, however, That such lands were not at the time of the entry into possession thereof covered by any withdrawal.

Mr. Mondell: It is not intended to grant this relief to anyone entering upon lands covered by withdrawals.

Mr. Lenroot: Does this clause enlarge the law in any respect?

Mr. Mondell: Well, I think it makes it better, because it makes it very plain that relief from the Yard decision shall not extend to anyone who went upon the lands while they were withdrawn.

Mr. Lenroot: I say to the gentleman: In the law we passed last year this provision is found:

That the rights of any person who at the date of any order of withdrawal, heretofore or hereafter made, who is a *bona fide* occupant or claimant of oil or gas bearing lands, and who at such date is in diligent prosecution of work leading to the discovery of oil or gas, shall not be affected or impaired by such order so long as the occupant or claim-

ant shall continue in diligent prosecution of said work.

Now, it occurs to me that the last clause in this bill touching this matter may enlarge that somewhat.

Mr. Mondell: I will say to the gentleman the intent of it was not to enlarge it, if I understand what he means by enlargement, but to make it clear that this relief should not be granted to anyone who was on land when withdrawn. Now, there may be a question as to whether withdrawals of land prior to the passage of the so-called Pickett bill will be held by the courts to be valid, or if they were held to be invalid, still we insist that whether it be valid or not no one shall have the benefit of the law who was on the land when its withdrawal was made.

Mr. Lenroot: And so far as the law itself is concerned it is limited solely to the question of not refusing a patent because of the transfer.

Mr. Mondell: I understand, but we limit the relief from the effect of the Yard decision to those who went on land when there was no sort of withdrawal against it of any sort or kind, and the intent was to go further than we did in the Pickett bill, if possible, and to limit this right to those where there can be no question of good faith.

Mr. Lenroot: Is it not possible with this language the construction would be that where withdrawals have taken place and entries have been made, and the entrymen have not complied with the law, that they, too, will be given the benefit of this law?

Mr. Parsons: No; it is broader than that. The controversy in the committee, I will say, is this: This relief was sought on property of locators who had gone on oil lands after the Executive withdrawal and before we passed that act; but

the committee was unwilling that the act should give any relief to people who had gone on in the face of the Executive withdrawal, even though they claimed, and even though the law may say that the withdrawal was not legal, and we have thought it ought to be wiped out, and that is why the proviso was put on.

Mr. Lenroot: One other question. Under the mining laws it is necessary that the claimant initiate his entry in good faith? That question is suggested here.

Mr. Mondell: No, not as we understand it under the other land law. He discovers mineral, and it is his to do with as he sees fit. He can, in fact, make a contract before he locates his claim.

Mr. Lenroot: He can make his claim and immediately transfer, without any thought of making the discovery or working the claim himself, and it is perfectly lawful?

Mr. Mondell: Yes; that has always been the case under our mining laws.

Mr. Lenroot: I yield back the balance of my time.

The Speaker: The time of the gentleman has expired.

Mr. Smith of California: I yield two minutes to the gentleman from Alabama (Mr. Craig), a member of the committee.

Mr. Craig: Mr. Speaker, this bill endeavors to put the oil locator on practically the same footing that the gold locator now is; the difference between the two being that the gold locator makes his discovery in the first instance, while the oil locator often does large amounts of work without making any discovery at all. In other words, he hardly ever digs unless he finds something on top. If he finds even a little piece of gold his discovery is made, and he or his transferee can get a patent. The oil locator comes

along and prospects a piece of land. He has got to drill possibly 2,000 to 3,000 feet deep before he can discover anything whatever. He has no discovery on which to base his patent before doing the work, and sometimes not even after much work is done. Therefore, under the Yard decision, if he transfers to any person whomsoever, his transferee gets nothing. The Yard decision says that the transfer is equivalent to an abandonment of his claim. Then, if the transferee of the oil locator goes ahead and spends his money and makes a discovery, even then he cannot get a patent under the Yard decision. This bill is intended to relieve that situation.

Mr. Hardy: Can he lease it without forfeiting his claim?

Mr. Craig: There is no provision for leasing at all. He has no title unless he makes a discovery; he has no such interest as would give him a patent. As to the corporation that the gentleman from Kentucky (Mr. James) is so afraid of, I want to say that this bill is intended to relieve hundreds of individual locators, who, under the existing law, have combined their eight separate locations of 20 acres each into a 160-acre tract and are about to be deprived of their patents because of this Yard decision.

These individual locators had to combine, according to the testimony before the committee, in order to get credit upon which to operate their claims; and one of them stated to me that that credit had been withdrawn and that their locations were in jeopardy because they could not get the money upon which to operate; that the Yard decision had rendered their holdings so uncertain that the banks had lost faith in oil developments on Government lands in California, and many locators were absolutely in need of relief which this bill will provide.

The Speaker: The time of the gentleman has expired.

Mr. Smith of California: Mr. Speaker, I yield the balance of my time to my colleague from California (Mr. Needham).

Mr. Needham: Mr. Speaker, this legislation is requested by the oil operators in the West. For many years it has been the practice for eight individuals to go upon the public domain, each locate a claim of 20 acres, and then to form either a copartnership or a corporation, then each to deed his claim to such copartnership or corporation, and upon the discovery of oil on 20 acres to obtain patent to the whole 160 acres. Under that policy nearly 200 patents granting 160 acres each have been issued in the State of California alone. During the last year the Department decided that in such cases patent could only be issued to 20 acres, and as a result millions of dollars invested in oil in the West was jeopardized and investors refused to put more money into oil development, because it costs from \$25,000 to \$100,000 to make a discovery of oil by the sinking of wells. And the oil development of the West is waiting for the relief asked for in this bill. The oil people of California had a statewide mass meeting, and they sent to Washington a committee representing all those interested in the oil industry of California, and as a result the Committee on the Public Lands has unanimously reported this bill, which is now before the House of Representatives. Unless we get this relief the development of oil in the West must stop, because people will not invest from \$25,000 to \$100,000 to make a discovery of oil when it is only possible to obtain patent to 20 acres of land. This legislation simply carries out the policy which has been going on for years, and which oil operators and locators have relied upon in good faith, and is not in the interest, as the gentleman from Kentucky (Mr. James) seems to think, of corporations alone, but is in the interest of the locators, the individual miners as well,

and is demanded by all of the people of the West, and they are looking to us for this relief. And I say in all sincerity that this legislation ought to be passed without delay.

The Speaker: The question is on the motion to suspend the rules.

The question was taken; and two-thirds having voted in favor thereof, the amendment was agreed to, and the bill as amended was passed.

EXTRACT FROM VOL. 46, PART 4, PAGE
3410 (Senate Debate).

LOCATORS OF OIL AND GAS LANDS.

Mr. Flint: I ask unanimous consent for the present consideration of the bill (H. R. 32344) to protect the locators in good faith of oil and gas lands who shall have effected an actual discovery of oil or gas on the public lands of the United States, or their successors in interest.

The Secretary read the bill.

The Vice President: Is there objection to the present consideration of the bill?

Mr. Lodge: This seems to me an extremely important bill. I do not profess to understand it.

Mr. Flint: I can explain it to the Senator in a moment.

Mr. Lodge: It seems to involve the whole matter of oil and gas lands.

Mr. Flint: The Senator from Massachusetts is entirely mistaken. It does not involve anything of the kind. It is simply to correct a decision that has been rendered in reference to oil lands. The bill is recommended by the Department in that very decision, and this bill should pass. It is simply to make a correction.

The Vice President: Is there objection to the present consideration of the bill?

By unanimous consent, the Senate, as in Committee of the Whole, proceeded to consider the bill, which had been reported from the Committee on Public Lands with an amendment, on page 2, line 3, to strike out "entry into possession thereof covered by any withdrawal" and to insert "inception of development on or under such claim withdrawn from mineral entry," so as to make the bill read:

Be it enacted, etc., That in no case shall patent be denied to or for any lands heretofore located or claimed under the mining laws of the United States containing petroleum, mineral oil, or gas solely because of any transfer or assignment thereof or of any interest or interests therein by the original locator or locators, or any of them, to any qualified person or persons, or corporation, prior to discovery of oil or gas therein, but if such claim is in all other respects valid and regular, patent therefor, not exceeding 160 acres in any one claim, shall issue to the holder or holders thereof, as in other cases: *Provided, however,* That such lands were not at the time of inception of development on or under such claim withdrawn from mineral entry.

The amendment was agreed to.

The bill was reported to the Senate as amended, and the amendment was concurred in.

The amendment was ordered to be engrossed and the bill to be read a third time.

The bill was read the third time and passed.

EXTRACT FROM VOL. 46, PART 4, PAGE
3618 (House debate on Senate Amendments).

LOCATION OF OIL AND GAS.

The Speaker also laid before the House the bill (H. R. 32344) to protect locators in good

faith of oil and gas lands who shall have effected an actual discovery of oil or gas on the public lands of the United States or their successors in interest, with Senate amendments.

The Senate amendments were read.

Mr. Needham: Mr. Speaker, I move that the House concur in the Senate amendments.

Mr. Fitzgerald: Mr. Speaker, I would like to ask what is the effect of these Senate amendments.

Mr. Needham: This bill, as it passed the House, excepted land under any withdrawal, and the Senate amendments confine the exception or proviso to mineral withdrawals. As the law is now, on land withdrawn like national forests you can carry on mining, and the bill as it passed the House would stop that. This amendment of the Senate is to correct that, and refers to mineral withdrawals so as to make the bill logical and as it was intended when it passed the House.

Mr. Fitzgerald: It does not affect lands withdrawn for other purposes?

Mr. Needham: This amendment was agreed to in the Committee on the Public Lands, and I was requested to make this motion on behalf of my colleague, Mr. Smith, of the Committee on the Public Lands, who has gone home quite ill.

The motion was agreed to.

Not only do the plain words of the statute and the debate in Congress negative the idea that it was intended that assignees of original locators upon withdrawn lands should be relieved from the diligence required by the Pickett Act, but both of these sources of interpretation must impel the conclusion that it was the intention that the Act should not apply to assignees who are applying for lands within

withdrawn areas. We submit that the Act and the debate show clearly that the North American Oil Consolidated can never acquire patent or any rights in the land it claims in this suit, because the record discloses that the lands were within a withdrawn area and conveyed to it prior to discovery. The proviso of the Act by no strained construction but by clear intendment excludes assignees from claiming lands within withdrawn areas, and that such was the intention of Congress was declared in no uncertain terms by Representative Mondell on the floor of the House when questioned as to its meaning. In response to the inquiry by Mr. Lenroot, who called attention to the provisions of the Pickett Act, the following colloquy occurred:

“Mr. Mondell: I will say to the gentleman the intent of it was not to enlarge it, if I understand what he means by enlargement, but to make it clear that this relief should not be granted to anyone who was on land when withdrawn. Now, there may be a question as to whether withdrawals of land prior to the passage of the so-called Pickett bill will be held by the courts to be valid, or if they were held to be invalid, still we insist that whether it be valid or not no one shall have the benefit of the law who was on the land when its withdrawal was made.

“Mr. Lenroot: And so far as the law itself is concerned it is limited solely to the question of not refusing a patent because of the transfer.

“Mr. Mondell: I understand, but we limit the relief from the effect of the Yard decision to those who went on land when there was no sort of withdrawal against it of any sort or kind, and the intent was to go further than we did in the Pickett bill, if possible, and to limit this right to

those where there can be no question of good faith.

“Mr. Lenroot: Is it not possible with this language the construction would be that where withdrawals have taken place and entries have been made, and the entrymen have not complied with the law, that they, too, will be given the benefit of this law?”

“Mr. Parsons: No; it is broader than that. The controversy in the committee, I will say, is this: This relief was sought on property of locators who had gone on oil lands after the Executive withdrawal and before we passed that act; but the committee was unwilling that the act should give any relief to people who had gone on in the face of the Executive withdrawal, even though they claimed, and even though the law may say that the withdrawal was not legal, and we have thought it ought to be wiped out, and that is why the proviso was put on.”

If this Court will resort to the language just quoted in order to determine what was the intent of Congress, we submit that the language of this proviso excludes from the benefit of the Act of March 2, 1911, all persons who are claiming rights by reason of assignments prior to discovery unless it is shown that such assignments were made and the parties claiming patent were in possession and had started their development work prior to the date of withdrawal, to-wit, September 27, 1909. The record in this case (Cause No. 2789, page 21) discloses that the North American Oil Consolidated acquired no rights whatever in the land in controversy until July 14, 1913.

That it was not the intention of Congress to repeal the provisions of the Pickett Act requiring the continued diligence of work leading to the discovery of oil is further evidenced by the fact that on August 24, 1912, the Pickett Act of June 25, 1910, was amended as follows:

“An Act to amend section two of an act to authorize the President of the United States to make withdrawals of public lands in certain cases, approved June twenty-fifth, nineteen hundred and ten.

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section two of the act of Congress approved June twenty-fifth, nineteen hundred and ten (Thirty-sixth Statutes at Large, page eight hundred and forty-seven), be, and the same hereby is, amended to read as follows:

“ ‘Sec. 2. That all lands withdrawn under the provisions of this act shall at all times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals:

“Provided, That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a *bona fide* occupant or claimant of oil or gas bearing lands and who, at such date, is in the diligent prosecution of work leading to the discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work: *Provided further,* That this act shall not be construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands

made prior to June twenty-fifth, nineteen hundred and ten: *And provided further*, That there shall be excepted from the force and effect of any withdrawal made under the provisions of this act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made: *And provided further*, That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created, within the limits of the States of California, Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by act of Congress.' "

It will be noted that the provisions of the Pickett Act were changed by striking out the words "so far as the same applied to minerals other than coal, oil, gas, and phosphates," and by inserting in lieu thereof the words "metalliferous minerals"; by adding the word "the" between the words "in" and "diligent"; by adding the word "the" between the words "to" and "discovery"; by striking out the words "the passage of this act" and inserting in lieu thereof "June twenty-fifth, nineteen hundred and ten"; and by inserting the name "California" in the last proviso. It is therefore very evident that Congress did not intend by the Act of March 2, 1911, to relieve any claimants of the diligence required by the Pickett Act.

We therefore insist that the decree of the Court below should be affirmed.

Respectfully submitted,

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Attorneys for Appellee.

No. 2788

su 2787
United States

Circuit Court of Appeals

For the Ninth Circuit.

CONSOLIDATED MUTUAL OIL COMPANY, a
Corporation, and J. M. McLEOD,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for
the Southern District of California,
Southern Division.

Filed

SEP 33 1916

R. D. Monckton,

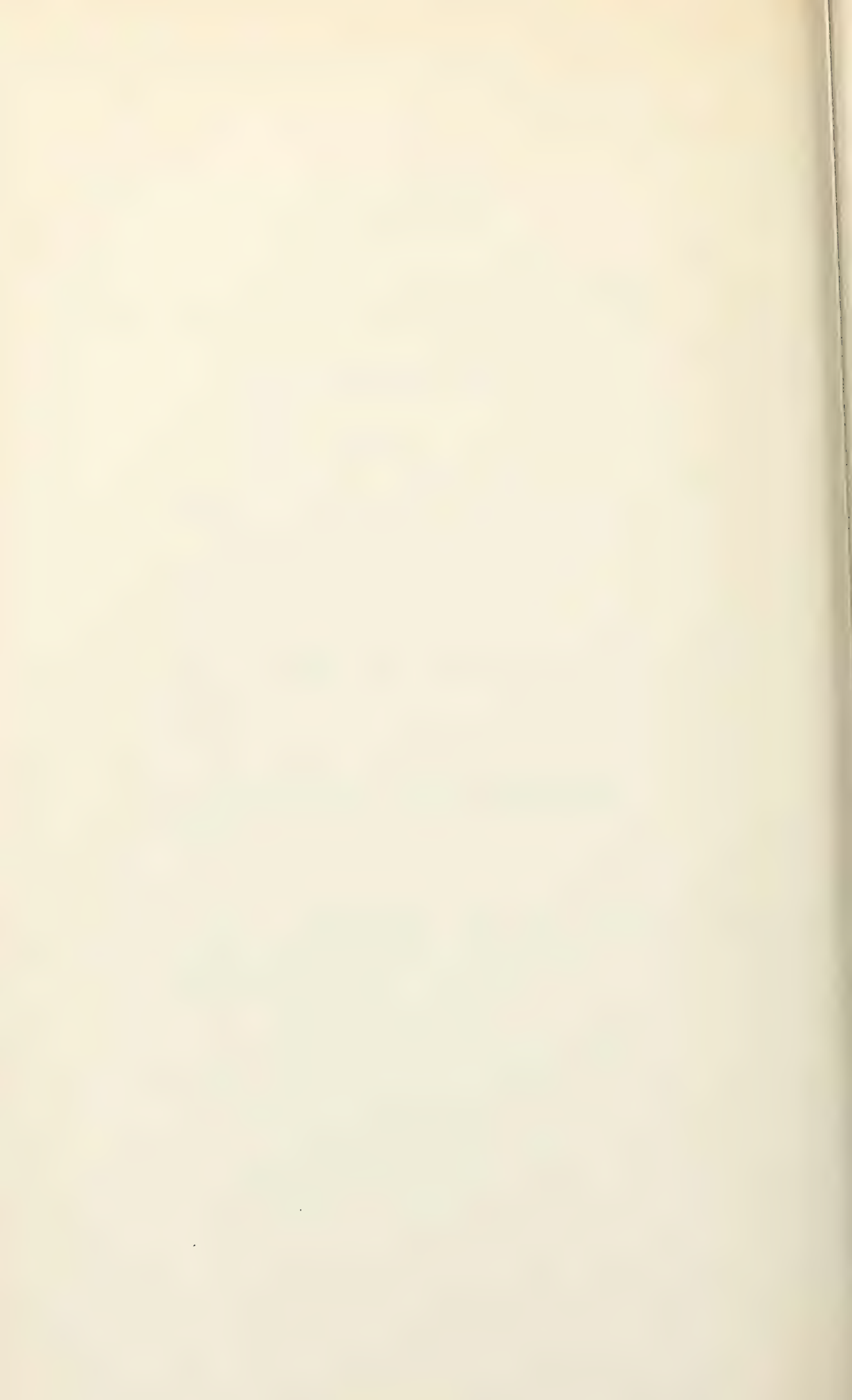
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Names and Addresses of Attorneys of Record.

For Appellant, Consolidated Mutual Oil Company:

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For Appellant, J. M. McLeod:

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For Appellees, The United States of America:

ALBERT SCHOONOVER, Esq., United States Attorney, Los Angeles, California; E. J. JUSTICE, Esq., A. E. CAMPBELL, Esq., and FRANK HALL, Esq., Special Assistants to the United States Attorney General, 214 Postoffice Building, San Francisco, California. [4*]

*Page-number appearing at foot of page of original certified Record.

*In the United States Circuit Court of Appeals for
the Ninth Judicial Circuit.*

No. —

UNITED STATES OF AMERICA,

Plaintiff and Appellee,

vs.

CONSOLIDATED MUTUAL OIL COMPANY,
NORTH AMERICAN OIL CONSOLI-
DATED, MAYS CONSOLIDATED OIL
COMPANY, J. M. McLEOD, LOUIS TITUS,
STANDARD OIL COMPANY, GENERAL
PETROLEUM COMPANY, ASSOCIATED
OIL COMPANY, and CALIFORNIA NA-
TURAL GAS COMPANY,

Defendants and Appellants.

Citation on Appeal.

United States of America,—ss.

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, Ninth Judicial Circuit, to be held at San Francisco, California, on the 1st day of April, 1916, being within thirty days from the date hereof, pursuant to an order allowing an appeal of record in the clerk's office of the District Court of the United States for the Southern District of California in the suit numbered A-42 Equity in the records of said court, wherein the United States of America is

plaintiff and appellee, and among others, Consolidated Mutual Oil Company and J. M. McLeod are defendants and appellants, to show cause, if any there be, why the interlocutory decree directing the appointment of a Receiver rendered against the said defendants should not be corrected, and why speedy justice should not be done in that behalf.

WITNESS, the Honorable M. T. DOOLING,
United States District Judge, this 3d day of March,
1916.

M. T. DOOLING,
Judge. [5]

Due service and receipt of a copy of the within Citation on Appeal this 3d day of March, 1916, is hereby admitted.

E. J. JUSTICE,
Attorney for Plf.
J. W. W.

No. A-42. In the United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Plaintiff and Appellee, vs. Consolidated Mutual Oil Company et al., Defendants and Appellants. Citation. Filed Mar. 4, 1916. Wm. M. Van Dyke, Clerk. By R. S. Zimmermann, Deputy Clerk.
[6]

*In the District Court of the United States, in and for
the Southern District of California, Northern
Division.*

No. A-42—EQUITY.

THE UNITED STATES OF AMERICA,
Complainants,

vs.

CONSOLIDATED MUTUAL OIL COMPANY,
NORTH AMERICAN OIL CONSOLI-
DATED, MAYS CONSOLIDATED OIL
COMPANY, J. M. McLEOD, LOUIS TITUS,
STANDARD OIL COMPANY, COLUMBUS
MIDWAY OIL COMPANY, GENERAL
PETROLEUM COMPANY, ASSOCIATED
OIL COMPANY and CALIFORNIA NA-
TURAL GAS COMPANY,

Defendants. [7]

*In the District Court of the United States, for the
Southern District of California, Northern Di-
vision, Ninth Circuit.*

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CONSOLIDATED MUTUAL OIL COMPANY,
NORTH AMERICAN OIL CONSOLI-
DATED, MAYS CONSOLIDATED OIL
COMPANY, J. M. McLEOD, LOUIS TITUS,
STANDARD OIL COMPANY, COLUMBUS

MIDWAY OIL COMPANY, GENERAL
PETROLEUM COMPANY, ASSOCIATED
OIL COMPANY and CALIFORNIA NA-
TURAL GAS COMPANY,

Defendants.

Bill of Complaint.

To the Judges of the District Court of the United
States for the Southern District of California,
Sitting Within and for the Northern Division of
Said District.

The United States of America, by Thomas W.
Gregory, its attorney general, presents this, its Bill
in Equity, against Consolidated Mutual Oil Com-
pany, North American Oil Consolidated, Mays Con-
solidated Oil Company, J. M. McLeod, Louis Titus,
Standard Oil Company, Columbus Midway Oil Com-
pany, General Petroleum Company, Associated Oil
Company and California Natural Gas Company,
(citizens and residents, respectively, as stated in the
next succeeding paragraph of this bill) and for
cause of complaint alleges:

I.

Each of the defendants, Consolidated Mutual Oil
Company, North American Oil Consolidated, Stand-
ard Oil [8] Company, Columbus Midway Oil
Company, General Petroleum Company, Associated
Oil Company and California Natural Gas Company,
now is, and at all the times hereinafter mentioned as
to it, was a corporation, organized under the laws
of the State of California.

The defendant, Mays Consolidated Oil Company,
now is, and at all the times hereinafter mentioned

as to *is*, was a corporation, organized under the laws of the State of Nevada.

The defendants, J. M. McLeod and Louis Titus, now are, and at all the times hereinafter mentioned as to them were, residents and citizens of the State of California, as complainant is advised and believes, and so alleges:

II.

For a long time prior to and on the 27th day of September, 1909, and at all times since said date, the plaintiff has been and now is the owner and entitled to the possession of the following described petroleum, or mineral oil, and gas lands, to wit:

The Northwest quarter of Section Twenty-eight (28), Township Thirty-one (31) South, Range Twenty-three (23) East, M. D. M., and of the oil, petroleum, gas, and all other minerals contained in said land.

III.

On the 27th day of September, 1909, the President of the United States, acting by and through the Secretary of the Interior, and under the authority legally invested in him so to do, duly and regularly withdrew and reserved all of the land hereinbefore particularly described (together with other lands) from mineral exploration, and from all forms of location or settlement, selection, filing, [9] entry, patent, occupation, or disposal, under the mineral and nonmineral land laws of the United States, and since said last-named date none of said lands have been subject to exploration for mineral oil, petroleum or gas, occupation, or the institution of any

right under the public land laws of the United States.

IV.

Notwithstanding the premises, and in violation of the proprietary and other rights of this plaintiff, and in violation of the laws of the United States and lawful orders and proclamations of the President of the United States, and particularly in violation of the said order of withdrawal of the 27th of September, 1909, the defendants herein, to wit, Consolidated Mutual Oil Company, North American Oil Consolidated, Mays Consolidated Oil Company, Standard Oil Company, J. M. McLeod and Louis Titus, entered upon the said land hereinbefore particularly described, long subsequent to the 27th day of September, 1909, for the purpose of exploring said land for petroleum and gas.

V.

Said defendants, Consolidated Mutual Oil Company, North American Oil Consolidated, Mays Consolidated Oil Company, Standard Oil Company, J. M. McLeod and Louis Titus, had not discovered petroleum, gas or other minerals on said land, on or before the 27th day of September, 1909, and had acquired no rights on, or with respect to said land on or prior to said date.

VI.

Long after the said order of withdrawal of September 27, 1909, to wit, some time in the latter part of the year, 1910, as plaintiff is informed and believes, [10] there was first produced minerals, to wit, petroleum and gas, on or from said land, and

the defendants, Consolidated Mutual Oil Company, North American Oil Consolidated, Mays Consolidated Oil Company, Standard Oil Company, J. M. McLeod, and Louis Titus, have produced and caused to be produced therefrom large quantities of petroleum and gas, but the exact amount so produced plaintiff is unable to state. Of the petroleum and gas so produced, large quantities thereof have been sold and delivered by the said defendant, Standard Oil Company to the Standard Oil Company, and by the said defendant, Mays Consolidated Oil Company, to the Standard Oil Company and the General Petroleum Company, and by the said defendants, Consolidated Mutual Oil Company, North American Oil Consolidated, J. M. McLeod and Louis Titus, to the Standard Oil Company, the General Petroleum Company and the Associated Oil Company, and the said defendants, Consolidated Mutual Oil Company, North American Oil Consolidated, Mays Consolidated Oil Company, Standard Oil Company, J. M. McLeod and Louis Titus, have sold and disposed of oil and gas produced from said land to others to plaintiff unknown. Plaintiff does not know, and is therefore unable to state, the amount of petroleum and gas which defendants, Consolidated Mutual Oil Company, North American Oil Consolidated, Mays Consolidated Oil Company, Standard Oil Company, J. M. McLeod and Louis Titus, have extracted from said land and sold, nor the amount extracted and now remaining undisposed of; nor the price received for such oil as has been sold, and has no means of ascertaining the facts in the premises, except from

said defendants, Consolidated Mutual Oil Company, North American Oil Consolidated, Mays Consolidated Oil [11] Company, Standard Oil Company, J. M. McLeod, Louis Titus, General Petroleum Company, and the Associated Oil Company, and therefore, a full discovery from said defendants is sought herein.

VII.

The defendants, Consolidated Mutual Oil Company, North American Oil Consolidated, Mays Consolidated Oil Company, Standard Oil Company, J. M. McLeod and Louis Titus, are now extracting oil and gas from said land, drilling oil and gas wells, and otherwise trespassing upon said land and asserting claim thereto, and if they continue to procure oil and gas therefrom, it will be taken and wrongfully sold and converted, and various other trespasses and waste will be committed upon said land, to the irreparable injury of complainant, and will interfere with the policies of the complainant, with respect to the conservation, use and disposition of said land, and particularly the petroleum, oil and gas contained therein.

VIII.

Each of the defendants claims some right, title or interest in said land, or some part thereof, or in the oil, petroleum or gas extracted therefrom, or in or to the proceeds arising from the sale thereof, or through and by purchase thereof, and each of said claims as predicated upon or derived directly or mediately from some pretended notice or notices of mining locations, and by conveyances, contracts

or liens directly or mediately from said such pretended locators. But none of such location notices and claims are valid against complainant, and no rights have accrued to the defendants, or either of them, thereunder, [12] either directly or mediately; nor have any minerals been discovered or produced on said land except as hereinbefore stated; but said claims so asserted cast a cloud upon the title of the complainant and wrongfully interfere with its operation and disposition of said land, to the great and irreparable injury of complainant, and the complainant is without redress of adequate remedy save by this suit, and this suit is necessary to avoid a multiplicity of actions.

IX.

Neither of the defendants, nor any person or corporation from whom they have derived any alleged interest, was, at the date of said order of withdrawal of September 27, 1909, nor was any other person at such date, a *bona fide* occupant or claimant of said land and in the diligent prosecution of work leading to the discovery of oil or gas.

X.

The defendants, Standard Oil Company, Consolidated Mutual Oil Company, North American Oil Consolidated, Mays Consolidated Oil Company, J. M. McLeod and Louis Titus, claim said lands under an alleged location notice, which purports to have been posted and filed in the names of Herbert M. Walker, H. E. Bashore, R. B. Welch, F. H. Romaine, Jr., W. A. Keenan, C. Rupert Walker, Eugene Metz and William Mahn, and known as the "Texas"

placer mining claim, bearing date January 1st, 1910.

XI.

The said location notice was filed and posted by or for the sole benefit of the defendant, J. M. McLeod, or for someone else other than the persons whose names were used in said pretended location notice, and the [13] names of the pretended locators above set out were used to enable J. M. McLeod, or some other person than said persons whose names were so used, to acquire more than twenty acres of mineral land in violation of the laws of the United States. The said persons whose names were so used in said location notice were not *bona fide* locators, and each of them was without an interest in said location notice so filed, and their names were not used to enable them, or either of them, to secure said land or patent therefor; but each of said persons was a mere dummy, used for the purposes alleged, all of which complainant is informèd and believes, and so alleges.

XII.

Except as in this bill stated, the plaintiff has no other knowledge or information concerning the nature of any other claims asserted by the defendants herein, or any of them, and therefore leaves said defendants to set forth their respective claims of interest.

In that behalf, the plaintiff alleges that, because of the premises of this bill none of the defendants have, or ever have had any right, title or interest in or to, or lien upon said land, or any part thereof, or any right, title, or interest in or to the petroleum,

mineral, oil or gas deposited therein, or any right to extract the petroleum or mineral oil or gas from said land, or to convey or dispose of the petroleum and gas so extracted, or any part thereof; on the contrary, the acts of those defendants who have entered upon said land and drilled oil wells and used and appropriated the petroleum and gas deposited therein, and assumed to sell and convey any interest in or to any part of said land, were all in violation [14] of the laws of the United States and the aforesaid order withdrawing and reserving said land, and all of said acts were and are in violation of the rights of the plaintiff, and such acts interfere with the execution by complainant, of its public policies with respect to said land.

XIII.

The present value of said land hereinbefore described exceeds Two Hundred Thousand Dollars (\$200,000).

In consideration of the premises thus exhibited, and inasmuch as plaintiff is without full and adequate remedy in the premises, save in a court of equity where matters of this nature are properly cognizable and relievable, plaintiff prays:

1. That said defendants, and each of them, may be required to make full, true and direct answer respectively to all and singular the matters and things hereinbefore stated and charged, and to fully disclose and state their claims to said land hereinbefore described, and to any and all parts thereof, as fully and particularly as if they had been particularly interrogated thereunto, but not under oath,

answer under oath being hereby expressly waived;

2. That the said land may be declared by this Court to have been at all times from and after the 27th day of September, 1909, lawfully withdrawn from mineral exploration and from all forms of location, settlement, selection, filing, entry or disposal under the mineral or nonmineral public land laws of the United States; and that the said location notice was fraudulently filed, and the said defendants did not acquire any right thereunder;

3. That said defendants, and each of them, may be [15] adjudged and decreed to have no estate, right, title, interest, or claim in or to said land or any part thereof, or in or to any mineral or minerals or mineral deposits contained in or under said land, or any part thereof; and that all and singular of said land, together with all of the minerals and mineral deposits, including mineral-oil, petroleum and gas therein or thereunder contained, may be adjudged and decreed to be the perfect property of this plaintiff, free and clear of the claims of said defendants, and each and every one of them;

4. That each and all of the defendants herein, their officers, agents, servants, and attorneys, during the progress of this suit, and thereafter, finally and perpetually may be enjoined from asserting or claiming any right, title, interest, claim, or lien in or to the said land, or any part thereof, or in or to any of the minerals, or mineral deposits therein, or thereunder contained; and that each and all of the defendants herein, their officers, agents, servants and attorneys, during the progress of this suit, and

thereafter, finally and perpetually may be enjoined from going upon any part or portion of said land, and from in any manner using any of said land and premises, and from in any manner extracting, removing or using any of the minerals deposited in or under said land and premises, or any part or portion thereof, or any of the other natural products thereof, and from in any manner committing any trespass or waste upon any of said land or with reference to any of the minerals deposited therein or thereunder, or any of the other natural products thereof; [16]

5. That an accounting may be had by said defendants, and each and every one of them, wherein said defendants, and each of them, shall make a full, complete, itemized and correct disclosure of the quantity of minerals (and particularly petroleum) removed or extracted, or received by them, or either of them, from said land, or any part thereof, and of any and all moneys or other property or thing of value received from the sale or disposition of any and all minerals and extracted from said land, or any part thereof, and of all rents and profits received under any sale, lease, transfer, conveyance, contract, or agreement concerning said land, or any part thereof; and that the plaintiff may recover from said defendants, respectively, all damages sustained by the plaintiff in these premises;

6. That a receiver may be appointed by this Court to take possession of said land and of all wells, derricks, drills, pumps, storage vats, pipes, pipe-lines, shops, houses, machinery, tools and ap-

pliances of every character whatsoever thereon, belonging to or in the possession of said defendants or any of them, which have been used or now are being used in the extraction, storage, transportation, refining, sale, manufacture, or in any other manner in the production of petroleum or petroleum products or other minerals from said land, or any part thereof, for the purpose of continuing, and with full power and authority to continue the operations on said land in the production and sale of petroleum and other minerals when such course is necessary to protect the property of the complainant against injury and waste, and for the preservation, protection and use of the oil [17] and gas in said land, and the wells, derricks, pumps, tanks, storage vats, pipes, pipelines, houses, shops, tools, machinery, and appliances being used by the defendants, their officers, agents or assigns in the production, transportation, manufacture, or sale of petroleum or other minerals from said land, or any part thereof, and that such receiver may have the usual and general powers vested in receivers of courts of chancery.

7. That the plaintiff may have such other and further relief as in equity may seem just and proper.

To the end, therefore, that this plaintiff may obtain the relief to which it is justly entitled in the premises, may it please your Honors to grant unto the plaintiff a writ or writs of subpoena, issued by and under the seal of this Honorable Court, directed to said defendants, herein, to wit: Consolidated Mutual Oil Company, North American Oil Consolidated, Mays Consolidated Oil Company, J. M. Mc-

Leod, Louis Titus, Standard Oil Company, Columbus Midway Oil Company, General Petroleum Company, Associated Oil Company and California Natural Gas Company, therein and thereby commanding them, and each of them, at a certain time, and under a certain penalty therein to be named, to be and appear before this Honorable Court, and then and there, severally, full, true and direct answers make to all and singular the premises, but not under oath, answer under oath being hereby expressly waived, and stand to perform and abide by such order, direction and decree as may be made against them, or any of them, in the premises, and shall [18] be meet and agreeable to equity.

THOMAS W. GREGORY,
Attorney General of the United States.

ALBERT SCHOONOVER,
United States District Attorney.

E. J. JUSTICE,
Special Assistant to the Attorney General.

A. E. CAMPBELL,
Special Assistant to the Attorney General. [19]

United States of America,
Southern District of California,—ss.

R. W. Dyer, being first duly sworn, deposes and says:

He is now, and has been since the 29th day of April, 1911, a special agent of the General Land Office of the United States, and, since the 20th day of June, 1913, has been engaged in the investigation of facts relating to the lands withdrawn by the President as oil lands, and especially the lands with-

drawn by order of September 27, 1909, and by the order of July 2d, 1910. That from such examination of such lands, and the facts ascertained in relation thereto, and from the examination of the records of the General Land Office, and the local land offices of complainant in the said State of California, and the examination of court records and county records, and particularly from affidavits setting forth the facts, he is informed as to the matters and things stated in the foregoing complaint, with reference to the particular lands therein described; and the matters therein stated are true, except as to such matters as are stated to be on information and belief, and as to those, affiant, after investigation, states he believes them to be true.

R. W. DYER.

Subscribed and sworn to before me this 16th day of October, 1915.

[Seal]

T. L. BALDWIN,

Deputy Clerk, U. S. District Court, Northern District of California. [20]

[Endorsed]: No. A-42—Eq. In the District Court of the United States for the Southern District of California. United States of America, Plaintiff, vs. Consolidated Mutual Oil Company, et als., Defendants. Bill of Complaint. Filed Oct. 25, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. [21]

*In the District Court of the United States, for the
Southern District of California, Northern Di-
vision, Ninth Circuit.*

No. A-42—EQUITY.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CONSOLIDATED MUTUAL OIL COMPANY,
et al.,

Defendants.

Answer of Consolidated Mutual Oil Company.

COMES NOW the Consolidated Mutual Oil Company, one of the defendants named in the above-entitled and numbered suit, and answers the bill of complaint on file therein as follows:

FIRST DEFENCE.

As and for its first defence to the cause of action set forth in said bill of complaint, said defendant moves the Court for an order transferring said suit to the law side and calendar of the above-entitled court for trial and final disposition.

Said motion is made and based upon the ground that upon the allegations of the bill of complaint and from the prayer thereof it appears that said suit is one in ejectment brought by the plaintiff out of possession against the defendants in possession of the lands described [22] in the bill of complaint and for damages for past trespasses both subjects of litigation over which a court of equity has no

jurisdiction, and upon which the plaintiff has full, complete, speedy and adequate remedy in a court of law.

Said motion will be made and based upon the pleadings, records and files in the above-entitled and numbered suit.

SECOND DEFENCE.

As and for its second defence to the cause of action set forth in the bill of complaint on file in the above-entitled and numbered suit, this defendant moves the Court for an order striking out of said complaint the portions thereof following:

1. That portion of Paragraph VI beginning with the words "Plaintiff does not know" and ending with the words "is sought herein."

2. All of Paragraph VII.

3. That part of Paragraph VIII which reads as follows: "and wrongfully interfered with its operation and disposition of said land to the great and irreparable injury of complainant; and the complainant is without redress or adequate remedy save by this suit, and this suit is necessary to avoid a multiplicity of actions."

4. That part of Paragraph XII following: "and such acts interfere with the execution by complainant of its public policies with respect to said lands."

[23]

5. All of Paragraph XIII.

6. That portion of the bill of complaint following Paragraph XIII which reads: "and inasmuch as complainant is without full and adequate remedy in the premises, save in a court of equity where mat-

ters of this nature are properly cognizable and relievable.”

7. All of Paragraphs 4, 5 and 6 of the prayer of said bill of complaint.

Said motion will be made and based upon the ground that the portions of the bill of complaint above specified are and constitute scandalous and impertinent matter inserted in the bill of complaint and are redundant and surplusage.

Said motion will be made and based upon the pleadings, records and files in the above-entitled and numbered suit.

THIRD DEFENCE.

As and for its third defence to the cause of action set forth in the bill of complaint on file in the above-entitled and numbered suit, the defendant, Consolidated Mutual Oil Company, alleges that the above-entitled court sitting as a court of equity has no jurisdiction of the subject matter of said suit for that the allegations of the bill of complaint show that the main case made thereby and the chief object and purpose of the suit is to try the question of title to the land as between the plaintiff out of possession and the defendants in possession of the land described in the bill of complaint; to secure possession thereof from the defendants; and a judgment for damages for alleged trespasses, all [24] subjects without the jurisdiction of the court of equity and upon which plaintiff has full, adequate, speedy and complete remedy and relief in a court of law.

FOURTH DEFENCE.

As and for its fourth defence to the cause of ac-

tion set forth in the bill of complaint on file in the above-entitled and numbered suit, said defendant, Consolidated Mutual Oil Company, alleges:

That on January 1, 1909, the land described in said bill of complaint was public mineral land of the United States subject to location and purchase under the laws of the United States relating to the sale and disposition of lands commonly known as placers, and on said date the eight persons named as locators in Paragraph X of said bill of complaint, each being then a citizen of the United States and all having theretofore associated themselves together for the purpose of acquiring title to oil lands in the County of Kern, State of California, duly located said land as the Texas Placer Mining Claim and recorded notice of location thereof on January 5, 1909, in Book 74 of Mining Records, at page 500, records of Kern County, California.

Thereafter and on June 17, 1909, the said locators conveyed all of their right, title and interest in and to said land to J. M. McLeod, one of the defendants in the above-entitled action; that ever since said date said J. M. McLeod has claimed to be the owner of said land openly and notoriously and during said time has held said land and caused the same to be worked and developed for its minerals. [25]

That on June 18, 1914, said J. M. McLeod made Mineral Entry of said land and other land in the United States Land Office at Visalia, California, its Serial No. 04655, for the whole of the land described in said bill of complaint, under and pursuant to the

provisions of section 2332 of the Revised Statutes of the United States and Rules 74 to 77, inclusive, of the regulations promulgated by the Secretary of the Interior under and pursuant to the provisions of said section of the Revised Statutes of the United States; that notice of said Mineral Entry was given by said J. M. McLeod in all respects as required by law and the rules and regulations of the Department of the Interior, and on September 19, 1914, said J. M. McLeod having theretofore complied in every respect with the laws of the United States relating to the sale and disposition of its mineral lands commonly called placers, and with all of the rules and regulations promulgated thereunder by the Department of the Interior, paid to the United States, the plaintiff in this suit, and said plaintiff accepted without objection or protest of any kind, the sum of \$2.50 per acre for said land, or a total of \$400 therefor, and the Receiver of the United States Land Office at Visalia issued his final receipt therefor No. 1,493,022 on said last mentioned date.

That at the time of the making of said mineral entry a copy of the notice thereof and of the affidavit as to expenditures and improvements upon said land was furnished by said McLeod to the Chief of Field Division for the Visalia Land District.

That on October 31, 1914, the Register of the United States Land Office at Visalia, California, issued [26] a final certificate of entry, certifying therein and thereby that said J. M. McLeod was entitled to have issued to him a United States Patent for

the lands described in said bill of complaint and other lands described in said certificate of entry.

That by reason of the foregoing facts set forth in this defence said J. M. McLeod became and was on October 31, 1914, long before the filing of the bill of complaint in this action, the owner of the land described in said bill of complaint and of the whole thereof, and the plaintiff in this suit was and is estopped and precluded from at any time after October 31, 1914, questioning the title of said J. M. McLeod to said land or any part thereof or to the minerals therein contained or extracted therefrom at any time prior to the date of the filing of said bill of complaint.

That this defendant, Consolidated Mutual Oil Company claims and owns and has an interest in the land described in said bill of complaint as lessee thereof, by virtue of leases in writing and duly recorded in the office of the recorder of Kern County, California, executed and delivered by said J. M. McLeod and others claiming by, through and under him.

FIFTH DEFENCE.

As and for a fifth defence to the bill of complaint on file in the above-entitled action, this defendant alleges:

That in the development of the land described in said bill of complaint there has been expended many thousands of dollars and the said development work has [27] extended over and been carried on diligently during a period of more than five years last past, all in strict conformity with the rules, regulations, customs and interpretations of the mining laws

of the United States that have been in existence and acquiesced in by the plaintiff herein and its Congress and the Department of the Interior for more than forty years prior to the filing of the complaint herein; that said work of development was also in conformity with the policy of said plaintiff that had been well settled and acted upon for a like period of time; that the large amount of money and time aforesaid was expended in good faith and for the purpose of honestly acquiring title to said land and also upon the faith of said long existent rules, customs, regulations and policies and upon the belief that plaintiff would not suddenly, as it now has, by the filing of this suit, reverse the same, to the irreparable injury of this defendant, its predecessors in interest and said J. M. McLeod and those claiming by, through and under him.

That the doing of said work of development and the expenditure of time and money in connection therewith was at all times with the full knowledge of this plaintiff by and through examinations of said land and of the things being done thereon made at various times by the agents of the Department of the Interior and reports thereof by said agents to said department, but notwithstanding such knowledge this plaintiff made no objection whatever at any time prior to the filing of said bill of complaint to the claim of title to said land by said J. M. McLeod and those claiming by, through and under him, or to the [28] possession, occupation and working thereof by said persons, until the filing of said bill of com-

plaint, and on account of such failure on the part of this *plaintiff* make objections as aforesaid, said J. M. McLeod and those claiming by, through and under him, including this defendant, were warranted in believing and did believe that the plaintiff did not and would not object to the use and occupation of said land or the claim of title thereto aforesaid, or the extraction and use of minerals therefrom, and said expenditures of money and time were made in full reliance upon such belief.

That by reason of the matters and things in this defence alleged, this defendant alleges, asserts and insists that the plaintiff is estopped from now claiming that it is entitled to the possession of said land or any part thereof, or of the mineral therein, or which has been produced therefrom or any part thereof, and that said plaintiff is guilty of laches in the institution of this suit and in objection to the rights and title of this defendant, said J. M. McLeod, or of any person claiming by, through or under him, and ought not now in all equity and good conscience to be heard to assert any claim or right to dispossess this defendant or any of the other defendants claiming an interest in said land or to assert any claim of right or title to any part of the minerals therein or heretofore extracted therefrom.

SIXTH DEFENCE.

Without waiving but on the contrary expressly reserving the full benefit of each of the defences heretofore set forth, this defendant, the Consolidated Mutual Oil [29] Company, as and for its sixth

defence to the cause of action set forth in the bill of complaint on file in the above-entitled suit, admits, denies and alleges as follows:

I.

Admits the allegations of Paragraph I of said bill of complaint.

II.

Denies that the plaintiff at any of the times mentioned in Paragraph II of said bill of complaint has been or now is the owner or entitled to the possession of the land described in said Paragraph II, or of any part thereof, or of the oil, petroleum, gas or any other minerals contained in said land, except subject to the right, title and interest therein of this defendant and of its codefendants Mays Consolidated Oil Company and J. M. McLeod.

On the contrary this defendant alleges that at the time of the filing of said bill of complaint and for a long time prior thereto this defendant was in the possession of said lands and rightfully entitled to hold possession thereof and to extract and dispose of the minerals therein contained for its own use and benefit by virtue of compliance and in good faith by its predecessors in interest with the laws of the United States relating to the sale and disposition of its mineral lands and by virtue of the Act of Congress of June 25, 1910 (36 Stats. at L. 874).

III.

Admits that on September 27, 1909, the President of the United States acting by and through the Secretary of the Interior, issued an order temporarily

withdrawing [30] from location, selection, settlement, filing, entry, patent or occupation under the mineral or nonmineral public land laws the lands, among others, described in Paragraph II of said bill of complaint, but denies that said order withdrew said land or any part thereof from mineral occupation or exploration; denies that since September 27, 1909, none of said lands have been subject to exploration for mineral, oil, petroleum or gas, or to occupation or to the institution of any right thereto under the public land laws of the United States.

On the contrary this defendant alleges that as to the lands described in Paragraph II of said bill of complaint, this defendant, the Mays Consolidated Oil Company, and J. M. McLeod, were at the time of the filing of said bill of complaint and for a long time prior thereto, authorized by the provisions of said Act of Congress, approved June 25, 1910, to continue in the occupation of said land and in its exploration and development for petroleum or gas or any other minerals therein contained for that by the terms of said Act of Congress whatever force or effect said order of withdrawal of September 27, 1909, had as to said land described in said Paragraph II was vacated and made null and void.

IV.

Denies that this defendant or its codefendants J. M. McLeod and Mays Consolidated Oil Company entered upon the land referred to in Paragraph IV of said bill of complaint and long or at any other time subsequent to September 27, 1909, for the purpose of exploring said land for petroleum or gas.

On the contrary this defendant alleges that [31] its codefendant J. M. McLeod entered upon said land for said purpose long prior to September 27, 1909, and on said date he was a *bona fide* occupant and claimant of the land described in said Paragraph II and the whole thereof in diligent prosecution of work leading to a discovery of oil or gas and thereafter continued in diligent prosecution of said work until the discovery in said land of petroleum therein.

Denies that any entry upon said land by said defendants or either of them was in violation of any proprietary or other right of the plaintiff or in violation of the laws of the United States or the lawful orders or proclamations of the President of the United States or in violation of said order of withdrawal of September 27, 1909.

V.

Denies that a discovery of petroleum, gas or other minerals was not made on said land described in said Paragraph II on or before September 27, 1909, and denies that defendants J. M. McLeod, Mays Consolidated Oil Company or this defendant, had acquired no rights on or with respect to said land on or prior to said date.

VI.

Denies that mineral was first produced upon said land in the latter part of the year 1910, or long after said order of withdrawal of September 27, 1909.

Admits that this defendant has produced petroleum from said land in the total amount of 16,500 barrels and that 11,250 barrels have been sold to the

General Petroleum Company and 5,250 barrels to the Associated Oil Company. [32]

VII.

Admits that this defendant is now extracting oil from said land, but denies that it is now drilling oil or gas wells thereon or in any wise trespassing upon said land; or that it will be wrongfully sold or converted; denies that various or any trespasses or waste will be committed upon said land if this defendant continues to procure oil or gas therefrom, to the irreparable or other injury of the complainant.

Denies that anything being done upon said land by this defendant will in any way interfere with the policies of the complainant mentioned in Paragraph VII of said bill of complaint.

VIII.

Admits that this defendant claims a right, title and interest in the land described in Paragraph II of said bill of complaint and in and to the oil, petroleum and gas therein and extracted therefrom and in the proceeds arising from the sale thereof, and that said claim is predicated upon the location thereof by the predecessors in interest of this defendant under the mining laws of the United States, to wit, a location made by the locators named in Paragraph X of said bill of complaint.

Denies that said location or that said claim is invalid against the plaintiff or that no rights have accrued to this defendant either directly or immediately under said location; denies that said claim so asserted casts a cloud upon the title of the complainant or wrongfully interfered with its operation or

disposition of said land to its great or other irreparable or other injury; denies that complainant is without redress and [33] adequate remedy save by this suit or that this suit is necessary to avoid a multiplicity of actions.

On the contrary this defendant alleges that a suit in ejectment with damages for withholding possession would afford this plaintiff full, complete, speedy and adequate relief in the premises.

IX.

Denies that neither of the defendants nor any person or corporation from whom they or either of them have derived an interest in said land was at the date of said order of withdrawal of September 27, 1909, a *bona fide* occupant or claimant of said land in the diligent prosecution of work leading to a discovery of oil or gas.

X.

Denies that this defendant or J. M. McLeod claims under a location notice posted and filed in the names of the locators mentioned in Paragraph X of said bill of complaint bearing date January 1, 1910.

On the contrary this defendant alleges that it and its predecessors in interest claim under a location notice posted and filed in the names of said locators on January 1, 1909.

XI.

Denies that said location notice was filed or posted by or for the sole benefit of the defendant J. M. McLeod or for some one else other than the persons whose names were used in said location notice; denies that the said locators were pretended locators or

were acting for the benefit of any person, firm or corporation other than themselves; denies that the persons named in [34] said location were not *bona fide* locators or that each of them was without interest in said location notice so filed or the land described therein; denies that their names were not used to enable them or either of them to secure said lands or patent therefor; denies that each of said persons was a mere dummy used for the purpose alleged in Paragraph XI of said bill of complaint.

On the contrary this defendant alleges that it is informed and believes and upon such information and belief states the fact to be that the persons named in Paragraph X of said complaint as locators of the Texas Placer Mining Claim covering the land described in said bill of complaint, were each citizens of the United States on January 1, 1909, and were on said date associated together in good faith for the purpose of locating said land and acquiring title thereto under and in pursuance of the laws of the United States relating to the sale and disposition of lands commonly known as placers, and that on said date locators in compliance with said laws duly located said land and then and thereby each of them became invested with the title to an undivided one-eighth interest in and to said land; that thereafter said defendant J. M. McLeod became vested by mesne conveyances with the title of said locators and each of them to said land and ever since has been and now is the owner thereof subject to the rights of this defendant therein.

Alleges that this defendant claims no right, title or interest in or to any part of the land described in said complaint except the south half of the northwest quarter of said section 28. [35]

XII.

Denies that because of the premises and said bill of complaint none of the defendants have or ever have had any right, title or interest in or to said land or any part thereof, or any right, title or interest in or to the petroleum, mineral, oil or gas deposit therein or any right to extract petroleum or mineral, oil or gas from said land or to convey or dispose of the petroleum or gas so extracted or any part thereof; denies that the acts of those defendants who have entered upon said land or drilled oil wells or used or appropriated the petroleum or gas deposit therein or assumed to sell or convey any interest in or to any part of said land were either or all in violation of the laws of the United States or of the said order of withdrawal; denies that all or any of said acts were or are in violation of the rights of the plaintiff or that said acts interfered with the execution by plaintiff of its public or other policies with respect to said lands.

On the contrary this defendant alleges that the entry of its predecessors in interest upon said land and its entry thereupon and the development thereof for mineral was pursuant to the invitation and encouragement so to do of the plaintiff by virtue of its long established and continued policy of liberality toward miners and others desiring to develop the

mineral lands of the plaintiff and acquire title thereto, which said policy, invitation and encouragement has continuously existed for more than forty years and had at the time of said location become so well settled and known and has been acted upon by both plaintiff and its citizens for so long as to have become, [36] long before September 27, 1909, and was on said date, a rule of property and was thereafter by Act of Congress approved June 25, 1910, aforesaid, expressly recognized and reiterated by the making of the President's order of temporary withdrawal dated September 27, 1909, wholly inoperative as to the lands described in the bill of complaint in this suit.

Denies that this plaintiff is without full or adequate remedy save in a court of equity, or that matters of the nature stated in said bill of complaint are properly cognizable and relievable in a court of equity.

WHEREFORE, defendant, Consolidated Mutual Oil Company having fully answered said bill of complaint, prays that plaintiff take nothing in this case against it and that the defendant be hence dismissed with its costs of suit and that it be awarded such other and further relief as may appear to be just and equitable.

U. T. CLOTFELTER,

Solicitor for Defendant, Consolidated Mutual Oil Company.

[Endorsed]: No. A-42—Equity. Dept. ——. In the District Court of the United States, Southern

District of California, Northern Division, Ninth Circuit. United States of America, Plaintiff, vs. Consolidated Mutual Oil Co., et al., Defendants. Answer of Consolidated Mutual Oil Company. Filed Nov. 20, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Received copy of the within Answer this 20th day of November, 1915. Albert Schoonover, U. S. Atty. By M. L., Attorney for Plaintiff. U. T. Clotfelter, 409 Kerckhoff Building, Los Angeles, California, Telephone: Main 2980, Attorney for said Defendant. [37]

*In the District Court of the United States, for the
Southern District of California, Northern Di-
vision, Ninth Circuit.*

A-42.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CONSOLIDATED MUTUAL OIL COMPANY,
NORTH AMERICAN OIL CONSOLI-
DATED, MAYS CONSOLIDATED OIL
COMPANY, J. M. McLEOD, LOUIS
TITUS, STANDARD OIL COMPANY,
COLUMBUS MIDWAY OIL COMPANY,
GENERAL PETROLEUM COMPANY,
ASSOCIATED OIL COMPANY, and CALI-
FORNIA NATURAL GAS COMPANY,
Defendants.

Notice of Motion for Restraining Order and Receiver.

To Consolidated Mutual Oil Company, North American Oil Consolidated, Mays Consolidated Oil Company, J. M. McLeod, Louis Titus, Standard Oil Company, Columbus Midway Oil Company, General Petroleum Company, Associated Oil Company, and California Natural Gas Company:

You and each of you, will take notice that the plaintiff, the United States of America, will move before the United States District Court for the Southern District of California, and the Judge thereof, M. T. Dooling, United States District Judge, at the courtroom of the said court in the Federal Building at Los Angeles, California, on the 30th day of November, 1915, at 10 o'clock, A. M., in the above-entitled cause, for the granting of an order restraining you, and each of you, your officers, agents, servants and attorneys from taking or moving from the said [38] premises described in the Bill of Complaint herein, any of the mineral oil or petroleum deposited therein, or any of the gas in or under said land, and from committing in any manner any trespass or waste upon any of said land, or with reference to any of the minerals deposited therein, pending the disposition of the said cause or the further order of this Court.

And you, and each of you, will further take notice that the plaintiff, the United States of America, will

then and there move the said Court and the Judge thereof in the above-entitled cause for the granting of an order appointing a receiver for the property described in the Bill of Complaint herein and operated by you, and each of you, and for the oil and petroleum heretofore extracted from said land, to be dealt with by the receiver in such manner as to the Court may seem proper.

The above motions will be submitted upon the verified Bill of Complaint on file herein, affidavits, documents, records, and oral testimony.

This, the 23d day of November, 1915.

E. J. JUSTICE,
FRANK HALL,

Solicitors for the Plaintiff, United States of
America. [39]

A-42.

Return on Service of Writ.

United States of America,
Southern District of California,—ss.

I hereby certify and return that I served the annexed Notice of Motion for Restraining Order and Receiver on the therein named Oscar Lawler, by handing to and leaving a true and correct copy thereof, with the clerk in the office of the above named personally at Los Angeles, California, in said District, on the 24th day of November, A. D. 1915.

C. T. WALTON,
U. S. Marshal.

By F. G. Thompson,
Deputy.

A-42.

Return on Service of Writ.

United States of America,

Southern District of California,—ss.

I hereby certify and return that I served the annexed Notice of Motion for Restraining Order and Receiver on the therein named U. T. Clotfelter, by handing to and leaving a true and correct copy thereof with U. T. Clotfelter personally at Los Angeles, California, in said District on the 24th day of November, A. D. 1915.

C. T. WALTON,

U. S. Marshal.

By F. G. Thompson,

Deputy.

[Endorsed]: No. A-42. In the District Court of the United States for the Southern District of California. United States of America, Plaintiff, vs. Consolidated Mutual Oil Company, et al., Defendants. Notice of Motion for Restraining Order and Receiver. Filed Dec. 1, 1915. Wm. M. Van Dyke, Clerk. T. F. Green, Deputy. [40]

*In the District Court of the United States, for the
Southern District of California, Northern Di-
vision, Ninth Circuit.*

A-42.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CONSOLIDATED MUTUAL OIL COMPANY,
NORTH AMERICAN OIL CONSOLI-
DATED, MAYS CONSOLIDATED OIL
COMPANY, J. M. McLEOD, LOUIS
TITUS, STANDARD OIL COMPANY,
COLUMBUS MIDWAY OIL COMPANY,
GENERAL PETROLEUM COMPANY,
ASSOCIATED OIL COMPANY, and CALI-
FORNIA NATURAL GAS COMPANY,

Defendants.

**Notice of Motion for Restraining Order and
Receiver.**

To Consolidated Mutual Oil Company, North Amer-
ican Oil Consolidated, Mays Consolidated Oil
Company, J. M. McLeod, Louis Titus, Standard
Oil Company, Columbus Midway Oil Company,
General Petroleum Company, Associated Oil
Company, and California Natural Gas Com-
pany:

You and each of you, will take notice that the
plaintiff, the United States of America, will move
before the United States District Court for the

Southern District of California, and the Judge thereof, M. T. Dooling, United States District Judge, at the courtroom of the said court in the Federal Building at Los Angeles, California, on the 30th day of November, 1915, at 10 o'clock, A. M., in the above-entitled cause, for the granting of an order restraining you, and each of you, your officers, agents, servants and attorneys from taking or moving from the said [41] premises described in the Bill of Complaint herein, any of the mineral oil or petroleum deposited therein, or any of the gas in or under said land, and from committing in any manner any trespass or waste upon any of said land, or with reference to any of the minerals deposited therein, pending the disposition of the said cause or the further order of this Court.

And you, and each of you, will further take notice that the plaintiff, the United States of America, will then and there move the said Court and the Judge thereof in the above-entitled cause for the granting of an order appointing a receiver for the property described in the Bill of Complaint herein and operated by you, and each of you, and for the oil and petroleum heretofore extracted from said land, to be dealt with by the receiver in such manner as to the Court may seem proper.

The above motions will be submitted upon the verified Bill of Complaint on file herein, affidavits, documents, records, and oral testimony.

This, the 23d day of November, 1915.

E. J. JUSTICE,

FRANK HALL,

Solicitors for the Plaintiff, United States of
America. [42]

Return on Service of Writ.

United States of America,

Southern District of California,—ss.

I hereby certify and return that I served the annexed Notice of Motion for Restraining Order, etc., on the therein-named Edmund Tauszky, Jordan & Brann, A. L. W Weil, Pillsbury, Madison & Sutro, by handing to and leaving a true and correct copy thereof with Edmund Tauszky, A. L. Weil, Oscar Sutro, member of the firm of Pillsbury, Madison & Sutro, and Wm. H. Jordan, member of the firm of Jordan & Brann, personally, at San Francisco, California, in said District, on the 24th day of November, A. D. 1915.

J. B. HOLOHAN,

U. S. Marshal.

By J. W. Jessen,

Office Deputy.

[Endorsed]: No. A-42. In the District Court of the United States for the Southern District of California. United States of America, Plaintiff, vs. Consolidated Mutual Oil Co., et al., Defendants. Notice of Hearing of Motion. Filed Dec. 6, 1915. Wm. M. Van Dyke, Clerk. By T. F. Green, Deputy Clerk. [43]

Minutes of Court—November 29, 1915.

At a stated term, to wit, the Special October Term, A. D. 1915, of the District Court of the United States of America, in and for the Southern District of California, Northern Division, held at the courtroom thereof, in the City of Los Angeles, on Monday, the twenty-ninth day of November, in the year of our Lord, one thousand nine hundred and fifteen. Present: The Honorable M. T. DOOLING, District Judge.

No. A-42—EQUITY.

THE UNITED STATES OF AMERICA,

Complainants,

vs.

CONSOLIDATED MUTUAL OIL COMPANY,
et al.,

Defendants.

**Order of Submission of Application for
Appointment of Receiver, etc.**

At the hour of 2 o'clock, P. M., on motion and by consent it is ordered that this cause be, and the same hereby is submitted to the Court for its consideration and decision on applications for appointment of receiver upon affidavits to be served and filed as follows, to wit: On behalf of complainants within ten (10) days after December 1st, 1915, and on behalf of all defendants served within ten (10) days thereafter, complainants and defendants to have five (5) days after the expiration of the time for filing affidavits

within which to submit briefs and points and authorities herein, if they so elect, and it is further ordered that the service of all copies of affidavits shall be by mail; and this cause having thereupon been called for hearing on the motions of defendant Associated Oil Company to dismiss the bill of complaint as to said defendant, to set aside service of subpoena *ad respondendum* [44] upon said defendant, to dismiss the bill of complaint, and to transfer this cause to the law side of the docket; and said motions having been argued, in support thereof, by Edmund Tauszky, Esq., of counsel for said defendant Associated Oil Company, and in opposition thereto by Frank Hall, Esq., Special Assistant to the U. S. Attorney General, of counsel for the United States; it is ordered that this cause be, and the same hereby is submitted to the Court for its consideration and decision on said motions to dismiss, and on the motion to set aside service on said defendant Associated Oil Company, and on said motion to transfer this cause to the law side of the docket, upon the argument thereof, and upon the argument had and briefs filed in the United States Circuit Court of Appeals for the Ninth Circuit in the appeal of defendant Eldora Oil Company in the cause in this court entitled The United States of America, Complainants, vs. Midway Northern Oil Company, et al., Defendants, No. 47-Civil, Northern Division; and it is further ordered that defendant Associated Oil Company may have ten (10) days after the ruling of the Court on said motions to dismiss the bill of complaint and motion to trans-

fer this cause to the law side of the docket, and after the receipt of advice from the clerk of this court as to said ruling, if such ruling shall be adverse to said defendants, within which to file answer to the bill of complaint. [45]

At a stated term, to wit, the Special October Term, A. D. 1915, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the City of Los Angeles, on Tuesday, the thirtieth day of November, in the year of our Lord, one thousand nine hundred and fifteen. Present: The Honorable M. T. DOOLING, District Judge.

No. A-42—EQUITY.

THE UNITED STATES OF AMERICA,

Complainants,

vs.

CONSOLIDATED MUTUAL OIL COMPANY,
et al.,

Defendants.

Minutes of Court—November 30, 1915.

On motion of Frank Hall, Esq., Special Assistant to the U. S. Attorney General, of counsel for the United States, it is ordered that the order heretofore made and entered herein submitting this cause upon applications for receiver be, and the same hereby is amended, by providing that, in addition to the affidavits to be served and filed, this cause also stand sub-

mitted as to said applications for receiver upon the verified pleadings filed in this cause. [46]

*In the District Court of the United States, for the
Southern District of California, Northern Di-
vision.*

No. A-42—EQUITY.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

CONSOLIDATED MUTUAL OIL CO. et al.,
Defendants.

**Order Granting Application for Appointment of
Receiver, etc., in Equity Case, No. E-42.**

ALBERT SCHOONOVER, Esq., United
States Attorney, E. J. JUSTICE, Esq.,
FRANK HALL, Esq., and A. E. CAMP-
BELL, Esq., Special Assistants to the At-
torney General, Attorneys for the Plaintiff.

OSCAR LAWLER, Esq., Attorney for J. M.
McLEOD, A. L. WEIL, Esq., Attorney for
GENERAL PETROLEUM OIL CO., U.
T. CLOTFELTER, Esq., Attorney for
CONSOLIDATED MUTUAL OIL CO.

For the reasons given in U. S. vs. Consolidated
Midway Oil Co., et al., No. A-2 Equity and U. S. vs.
Thirty-two Oil Co., et al., No. A-38 Equity, this day
decided, the application for the appointment of a
receiver is granted, and the motions to transfer to
the law side, to dismiss, to strike out and for fur-

ther and better particulars are denied.

February 1st, 1916.

M. T. DOOLING,
Judge.

[Endorsed]: No. A-42 Equity. U. S. District Court, Southern District of California, Northern Division. The United States of America, Plaintiff, vs. Consolidated Mutual Oil Co., et al., Defendants. Order granting Application for Appointment of receiver, and Denying Motions to Transfer to Law Side, to Dismiss, to Strike Out and for Further and Better Particulars. Filed Feb. 3, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [47]

*In the District Court of the United States, for the
Southern District of California, Northern Di-
vision.*

No. A-2—EQUITY.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

CONSOLIDATED MIDWAY OIL CO. et al.,
Defendants.

**Order Denying Motions to Transfer to Law Side to
Dismiss, etc.**

ALBERT SCHOONOVER, Esq., United States Attorney, E. J. JUSTICE, Esq., A. E. CAMPBELL, Esq., and FRANK HALL, Esq., Special Assistants to the Attorney General, Attorneys for the Plaintiff.

GEO. E. WHITAKER, Esq., Attorney for Midnight Oil Co., Edith F. Coons and National Pacific Oil Co. M. S. PLATZ, Esq., Attorney for Mary F. Francis. HUNSAKER & BRITT, Attorneys for Citizens' National Bank. L. C. GATES, Esq., Attorney for Title Insurance & Trust Co. FLINT & JUTTEN, Attorneys for California National Supply Co. OSCAR LAWLER, Esq., Attorney for Four Investment Co. PILLSBURY, MADISON & SUTRO, Attorneys for Standard Oil Co. J. P. SWEENEY, Esq., Attorney for Maricopa Oil Co.

As in a number of other cases submitted at the same time, a motion is presented to transfer this case from the equity to the law side of the court. The several grounds of the motion fall generally under one of the following heads:

1. That a plain, adequate and complete remedy may be had at law in an action in ejectment. [48]

2. That the present action is in effect one in ejectment and must be tried on the law side where the parties are entitled to a jury trial.

My conclusions as to these contentions, which a press of other matters do not afford me time to do more than state without elaboration, are as follows:

1. That ejectment does not afford a plain, adequate and complete remedy for the matters complained of in the bill of complaint herein.

2. That neither in form nor in substance is the action one in ejectment. Its purpose is the pre-

vention of waste; to restrain the defendants from withdrawing the oil from the lands in question. All other matters embraced in the bill are subordinate to this. Whether the defendants, by maintaining derricks and other structures on the lands, retain such possession as they may have acquired as against the Government, is of minor importance under the averments of the bill, so long as they do not destroy the real value and substance of the lands by withdrawing the oil therefrom before their right to do so shall have been finally determined.

It is not upon this motion decided whether such right should be finally determined by the Land Department or by the Court.

The motion to transfer is therefore denied. The motions to dismiss, to make more certain and to strike out are also denied.

February 1st, 1916.

M. T. DOOLING,
Judge. [49]

[Endorsed]: No. A-2—Equity. U. S. District Court, Southern District of California, Northern Division. The United States of America, Plaintiff, vs. Consolidated Midway Oil Co., et al., Defendant. Opinion and Order Denying Motions to Transfer to Law Side, to Dismiss, to Make More Certain and to Strike Out. Filed Feb. 3, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.
[50]

*In the District Court of the United States, for the
Southern District of California, Northern Di-
vision.*

No. A-38—EQUITY.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

THIRTY-TWO OIL CO. et al.,
Defendants,

**Order Granting Application for Appointment of
Receiver, etc., in Equity Case No. A-38.**

ALBERT SCHOONOVER, Esq., United
States Attorney, E. J. JUSTICE, Esq.,
A. E. CAMPBELL, Esq., and FRANK
HALL, Esq., Special Assistants to the
Attorney General, Attorneys for the Plain-
tiff.

EDMUND TAUSZKY, Esq., Attorney for
Associated Oil Co.

HUNSAKER & BRITT, Attorneys for Thirty-
Two Oil Co., and J. M. McLead.

OSCAR LAWLER, Esq., Attorney for Buick
Oil Co.

GEO. E. WHITAKER, Esq., Attorney for
California Midway Oil Co.

As in a number of other cases submitted at the
same time complainant moves for an injunction, and
the appointment of a receiver. In my judgment the
present status of the property in these cases should
be maintained, either by enjoining the withdrawal of

oil, or by the appointment of a receiver, until the right of defendants to withdraw oil from the land is finally determined either by the Land Department or by the Court. It seems to me that the appointment of a receiver will work less hardship to defendants than the granting of an injunction. For this reason the application for the appointment of a receiver is granted. The motion to dismiss, to strike out, to make more certain and to transfer to the law side are denied.

February 1st, 1916.

M. T. DOOLING,
Judge. [51]

[Endorsed]: No. A-38—Equity. U. S. District Court, Southern District of California, Northern Division. The United States of America, Plaintiff, vs. Thirty-Two Oil Co. et al., Defendants. Opinion and Order Granting Application for Appointment of Receiver, and Denying Motions to Dismiss, to Strike Out, to Make More Certain and to Transfer to Law Side. Filed Feb. 3, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [52]

*In the District Court of the United States, for the
Southern District of California, Northern Divi-
sion, Ninth Circuit.*

No. A-42—IN EQUITY.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CONSOLIDATED MUTUAL OIL COMPANY,
NORTH AMERICAN OIL CONSOLI-
DATED, MAYS CONSOLIDATED OIL
COMPANY, J. M. McLEOD, LOUIS
TITUS, STANDARD OIL COMPANY,
COLUMBUS MIDWAY OIL COMPANY,
GENERAL PETROLEUM COMPANY,
ASSOCIATED OIL COMPANY and CALI-
FORNIA NATURAL GAS COMPANY,
Defendants.

**Order Appointing Receiver in Equity Case No.
A-42.**

This suit coming on to be heard on motion of the complainant for the appointment of a receiver and for an injunction, and having been heard on the 30th day of November, 1915,

IT IS NOW CONSIDERED, ORDERED AND ADJUDGED that Howard M. Payne be, and he is hereby, appointed receiver of all the property described in the Bill of Complaint herein claimed by the defendants, to wit:

The Northwest quarter of Section Twenty-eight (28), Township Thirty-one (31) South, Range Twenty-three (23) East, Mount Diablo Base and Meridian, and situated in Kern County, State of California,

and of the oil, gas, and all other property of every kind now situated on the said land, or already extracted therefrom, and still in the possession of defendants; and the defendants, [53] and each of them, their agents, attorneys and employees, are enjoined from removing said oil, gas, or other property, or any part thereof, from said land, or in any manner interfering with the order of this Court, and are enjoined from further producing oil from said land, except by permission and under the direction of the said receiver.

Said receiver is directed to receive, and the said defendants are directed to surrender to said receiver all moneys in their hands or in the hands of any person or corporation for them, which are the proceeds of the sale of oil or gas produced from said lands hereinbefore described, and such persons holding such funds are directed to pay same to said receiver; and the said receiver is directed to collect any notes, accounts, or other evidences of debt due or payable on account of oil and gas produced from said land and sold by or for said defendants, or any of them.

The said receiver is given power and directed to operate any oil or gas well or wells on said property, or to permit them to be operated by the respective defendants now in possession of or operating

same, or who have heretofore operated on said lands; or to close said wells, if he deems it necessary or advisable to do so in order to conserve the oil and gas in said lands and prevent said property from being damaged or the oil or gas from being wasted.

The said receiver is directed to ascertain the quantity of oil and gas heretofore extracted by said respective defendants, and what disposition has been made thereof, and keep an account thereof, and to keep an accurate account of all oil and gas hereafter produced from said lands, and to sell said oil and gas for the best price obtainable. [54]

For the purpose of making an investigation and determining the condition of wells drilled on said lands, and particularly for the purpose of determining whether water is infiltrating the oil sands or reservoirs on said lands, and for the further purpose of ascertaining the amount of oil and gas heretofore produced, the price at which the same has been sold, and the value thereof, the receiver is directed and empowered to examine the logs of the wells and the books of account kept by the defendants or any of them in the development and operation of said lands.

For the purpose of preventing damage to said lands by the infiltration of water into the oil sands and otherwise, and for the purpose of protecting and operating the said property and carrying out the provisions of this order, the said receiver is authorized to employ such assistants and incur such expense, to be paid out of the moneys coming into his hands as receiver, as he shall deem necessary, subject to the approval of this Court.

A bond in the sum of Ten Thousand (10,000) Dollars, to be approved by this Court, shall be given by the receiver within fifteen days from the filing of this Order; provided the solicitor for the complainant or for the defendants, or either of them, may at any time upon one day's notice to counsel for the opposite parties, apply to the Court for an increase in the amount of said bond.

The moneys coming into the hands of the said receiver shall, unless otherwise directed by the Court, be deposited in a bank or banks in special interest-bearing accounts in the joint name of the receiver and the clerk of this court, and subject to the joint check and control of such persons, except so much of said funds as may be [55] necessary to pay the monthly current expenses of the receiver in executing the orders of this Court, and such sums as may be necessary for such purposes shall be deposited in a bank or banks to the credit of such receiver, as receiver for the respective defendants, and shall be subject to the receiver's check.

The amount of compensation to be paid to the receiver in this suit is to be determined hereafter.

This 2 day of February, 1916.

M. T. DOOLING,
United States District Judge.

[Endorsed]: No. A-42. In the District Court of the United States for the Southern District of California, Northern Div., Ninth Circuit. United States of America, Plaintiff, vs. Consolidated Mutual Oil Company et al., Defendants. Order Appointing Receiver. Filed Feb. 3, 1916. Wm. M.

Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [56]

*In the District Court of the United States, for the
Southern District of California, Northern Division,
Ninth Circuit.*

No. A-42.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CONSOLIDATED MUTUAL OIL COMPANY,
NORTH AMERICAN OIL CONSOLIDATED,
MAYS CONSOLIDATED OIL COMPANY,
J. M. McLEOD, LOUIS TITUS,
STANDARD OIL COMPANY,
COLUMBUS MIDWAY OIL COMPANY,
GENERAL PETROLEUM COMPANY,
ASSOCIATED OIL COMPANY and CALIFORNIA
NATURAL GAS COMPANY,

Defendants.

**Notice of Lodgment of Statement of Evidence on
Appeal.**

To the United States of America, Plaintiff Above
Named, and to E. J. Justice, Esq., Albert Schoonover,
Esq., A. E. Campbell, Esq., and Frank Hall, Esq.,
Solicitors for Said Plaintiff.

PLEASE TAKE NOTICE that on the 15th day
of March, 1916, defendants and appellants J. M. McLeod
and Consolidated Mutual Oil Company lodged with the
clerk of the above-entitled court their statement of
evidence to be included in Transcript on

Appeal; and that on the 25th day of March, 1916, said defendants and appellants will ask the Court or Judge to approve said statement of evidence.

Dated March 15th, 1916.

OSCAR LAWLER,

Solicitor for Defendant and Appellant, J. M. McLeod.

U. T. CLOTFELTER,

A. L. WEIL,

CHARLES S. WHEELER and

JOHN F. BOWIE,

Solicitors for Defendant and Appellant, Consolidated Mutual Oil Co. [57]

Due service and receipt of a copy of the within Notice of Lodgment of Statement, also copy of Statement of Evidence, this 15th day of March, 1916, is hereby admitted.

E. J. JUSTICE,

ALBERT SCHOONOVER,

A. E. CAMPBELL,

FRANK HALL,

Attorneys for Plaintiff.

[Endorsed]: No. A-42—Equity. In the United States District Court for the Southern District of California. United States of America, Plaintiff, vs. Consolidated Mutual Oil Company et al., Defendants. Notice of Lodgment of Statement of Evidence to be Included in Transcript on Appeal. Filed Mar. 16, 1916. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Charles S. Wheeler, Attorney for Defendant, Cons. Mutual Oil Company, Union Trust Building, San Francisco.

[58]

*In the District Court of the United States, for the
Southern District of California, Northern Di-
vision, Ninth Circuit.*

No. A-42.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CONSOLIDATED MUTUAL OIL COMPANY,
NORTH AMERICAN OIL CONSOLI-
DATED, MAYS CONSOLIDATED OIL
COMPANY, J. M. McLEOD, LOUIS TITUS,
STANDARD OIL COMPANY, COLUMBUS
MIDWAY OIL COMPANY, GENERAL
PETROLEUM COMPANY, ASSOCIATED
OIL COMPANY and CALIFORNIA NA-
TURAL GAS COMPANY,

Defendants.

**Statement of Evidence to be Included in Transcript
on Appeal.**

The motion for the appointment of a receiver was heard and determined upon the foregoing complaint and answers and upon the following affidavits:

1. AFFIDAVITS OFFERED BY PLAINTIFF:

[59]

Affidavit of E. W. Bailey.

State of California,

County of Kern;—ss.

E. W. Bailey, being first duly sworn, deposes and says:

That he is a citizen of the United States and over the age of 21 years, and that his postoffice address is Taft, California.

That early in the spring of 1909 he assumed the position of superintendent of the Mays Oil Company, now known as the Mays Consolidated Oil Company. That the derrick for well No. 1 on the SW. $\frac{1}{4}$ of Section 28, Township 31 South, Range 23 E., M. D. M., was erected a short time after he went to work for the Mays Oil Company, and probably about May, 1909, and that about the same time the said derrick on the SW. $\frac{1}{4}$ of Section 28, was erected, skeleton derricks were also erected on the NW. $\frac{1}{4}$, NE. $\frac{1}{4}$, and SE. $\frac{1}{4}$ of said Section 28, T. 31 S., R. 23 E., one skeleton derrick being erected on each of said quarter sections; that these skeleton derricks were all erected near the center of said Section 28, and that all of them were in plain sight from and within a short distance of Well No. 1 on the SW. $\frac{1}{4}$ of said Section 28. That he is unable to state the exact time these skeleton derricks on the NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$, Section 28, T. 31 S., R. 23 E. were erected, but that they were constructed after he assumed the position of superintendent for the Mays Oil Co., which was in the early spring of 1909, and between that time and the time drilling was started on Mays No. 1 well on the SW. $\frac{1}{4}$ of Section 28, which said drilling commenced about August or September, 1909; that he is positive these skeleton derricks on the said NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$, Section 28, T. 31 S., R. 23 E. were completed before drilling commenced on Well No. 1 on the

SW. $\frac{1}{4}$ of said Section 28, which, as heretofore stated, was about August or September, 1909. [60]

Affiant further states that some time during the summer of 1909, and prior to the time drilling commenced on Well No. 1 on the SW. $\frac{1}{4}$ of said Section 28, which was about August or September, 1909, a bunk-house about 12 x 20 feet in size was erected on the NW. $\frac{1}{4}$ of said Section 28, and a cook-house, about 20 x 30 feet in size, was erected on the said NE. $\frac{1}{4}$ of said Section 28; and that to the best of his recollection at this time, the work of building said bunk-house and cook-house did not require, altogether, more than about 15 days' time.

Affiant further states that he was employed as field superintendent of the Mays Oil Company from early in the spring of 1909 to about some time in November, 1909, and that during said period he was in direct charge of the work of said company on said Section 28, T. 31 S., R. 23 E., and was over and upon said Section practically every day during said period from the spring of 1909 to November, 1909; and that if any work had been performed on the NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ or SE. $\frac{1}{4}$ of said Section 28 during said period last above mentioned, he would have known of it and would have observed evidences of it. That no work was done or performed on said NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ or SE. $\frac{1}{4}$ of said Section 28, T. 31 S., R. 23 E., during the said period, from the spring of 1909 to November, 1909, other than is hereinbefore set out, except that some time during the summer of 1909 he recalls that some sagebrush was cleared away from the land around the three skeleton der-

ricks on the NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of said Section 28; and that when this affiant left the employ of the Mays Oil Co. in November, 1909, the only improvements on the said NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ and SE. $\frac{1}{4}$, Section 28, T. 31 S., R. 23 E. consisted of a skeleton derrick on each of said three quarter sections, together with a bunk-house on the NW. $\frac{1}{4}$ and a cook-house on the NE. $\frac{1}{4}$ of said section. [61]

That affiant resumed work with the Mays Oil Co. as field superintendent in January or February, 1910, and was in charge of said company's work on Section 28, T. 31 S., R. 23 E. from that time until about August, 1910; that upon his return to work for said company on said Section 28 in January, or February, 1910, he observed the condition of said NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ and SE. $\frac{1}{4}$, Section 28, T. 31 S., R. 23 E., and found that the improvements then upon the said last above-described lands were the same as when he left the employ of said Mays Oil Co. in November, 1909, to wit: a skeleton derrick on each of said three-quarter sections, a bunk-house on the NW. $\frac{1}{4}$, and a cook-house on the NE. $\frac{1}{4}$ of said Section 28.

That after returning to work for the Mays Oil Company on said Section 28 in January or February, 1910, a new skeleton derrick was erected on the NE. $\frac{1}{4}$ of Section 28, which work was done and performed under his supervision; that he is unable to state just when this new skeleton derrick was erected, but that the work of building the same, to the best of his recollection at this time, did not require more than four or five days' time. Affiant

further states that some time in June, 1910, the cellar at the derrick on the NE. $\frac{1}{4}$ of said Section 28 was dug under his supervision, and that the digging of this cellar, to the best of his recollection at this time, required about four days' time.

Affiant further states that after returning to work for the Mays Oil Co. in January or February, 1910, the skeleton derrick on the NW. $\frac{1}{4}$ of said Section 28, was timbered up under his supervision, that is to say, the derrick was completed as a standard derrick, ready for standard drilling, with engine-house, belt-house, bull-wheel, calf-wheel, etc.; that he is unable to state [62] at this time just when this work on the said NW. $\frac{1}{4}$, Section 28, as aforesaid, was performed, but to the best of his recollection at this time the rigging up of this said derrick required about five days' time.

Affiant further states that up to the time he left the employ of the Mays Oil Company, which was about August, 1910, boilers, engines, or tools had not been placed or installed at the derricks on either the NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ or SE. $\frac{1}{4}$, of Section 28, T. 31 S., R. 23 E., and that no drilling work of any kind or character had been performed upon said three-quarter sections, namely, the NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ or SE. $\frac{1}{4}$, Section 28, T. 31 S., R. 23 E., prior to the time he left the employ of the Mays Oil Company, which was about August, 1910; and that up to that time, namely, August, 1910, no discovery of oil or gas had been made upon either the NE. $\frac{1}{4}$, the NW. $\frac{1}{4}$ or the SE. $\frac{1}{4}$ of said Section 28, T. 31 S., R. 23 E. That he was over and upon said Section 28, T. 31 S., R.

23 E. practically every day from about January or February, 1910, to about August, 1910, and that if any work had been performed on the NE. $\frac{1}{4}$, NW. $\frac{1}{4}$, or SE. $\frac{1}{4}$ of said Section 28, during said period, other than the work hereinbefore set out, he would have known of it, and that no work in addition to that hereinbefore described, was done or performed on said lands during said period, namely, from January or February, 1910, to about August, 1910.

Affiant further states that for the past seven years he has been working in and around the oil fields of Kern County, California, and that he has supervised the construction of numerous skeleton derricks such as were placed on the lands in question herein, namely, the skeleton derricks that were [63] erected on the NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ and SE. $\frac{1}{4}$, Section 28, T. 31 S., R. 23 E., and that he has also observed the building of numerous such skeleton derricks; that it has been his experience and observation that a skeleton derrick such as was erected on each of the three-quarter sections above described, namely, the NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of Section 28, T. 31 S., R. 23 E., can, under ordinary circumstances, be constructed in about four days' time.

That by the term "skeleton derrick" as used in this affidavit, he means the bare skeleton of the derrick, without any engine-house, belt-house, bull-wheel, or calf-wheel.

E. W. BAILEY.

Subscribed and sworn to before me at Taft, California, this 7th day of December, 1915.

[Seal]

R. B. WHITEMORE,

Notary Public. [64]

Affidavit of O. L. Goode.

State of California,
County of Kern,—ss.

O. L. Goode, being first duly sworn, deposes and says:

That he is a citizen of the United States, and over the age of 21 years, and that his postoffice address is Taft, California.

That from August, 1909, to July or August, 1910, he was engaged driving teams and hauling for his brother, O. P. Goode; and that during the period mentioned, namely, from August, 1909, to July or August, 1910, he hauled oil with said O. P. Goode's teams from what was then known as the Hawaiian lease, about one-half mile west of Fellows, California, to Mays No. 1 well on Section 28, Township 31 South, Range 23 E., M. D. M.

That affiant is not familiar with the location of the four quarter sections of said Section 28, and is unable to state of his own knowledge the particular quarter section of said section upon which the well above mentioned, and known as Mays No. 1 well, is situated, but that during the period above mentioned, namely, from August, 1909, to July or August, 1910, no other wells were being drilled, and no drilling work of any kind or character was being performed upon any land within a radius of less than

one and one-half miles from the location of the well that was known as Mays No. 1 well on Section 28, T. 31 S., R. 23 E.

That during the entire period from August, 1909, to July or August, 1910, this affiant was to Mays No. 1 well on Section 28 on an average of twice each week, and by reason of such visits to and upon the said land was in a position to observe whether or not any other drilling work was being done on lands in the vicinity of the well known as Mays No. 1 well; and that [65] if any drilling work had been done on said Section 28, or within a radius of one and one-half miles of the well known as Mays No. 1 well, during said period, namely, from August, 1909, to July or August, 1910, he would have known of it.

That at the time this affiant first began hauling oil to Mays No. 1 well, which was in August, 1909, there were situated within a short distance of said Mays No. 1 well three skeleton derricks. That this affiant is unable to state when these skeleton derricks were erected, but that the said three derricks were completed and standing upon the land at the time he first visited the location of Mays No. 1 well on Section 28, in August, 1909.

That during the time this affiant was hauling oil to the well known as Mays No. 1 well on said Section 28, which was from August, 1909, to July or August, 1910, no drilling work of any kind or character was being done or performed at the locations of the three skeleton derricks that were situated near the well known as Mays No. 1 well on Section

28, as aforesaid, or at any of them, and that the only drilling work that was being carried on in the vicinity of said Mays No. 1 well on Section 28, during the period from August, 1909, to July or August, 1910, was the drilling work on the said Mays No. 1 well.

O. L. GOODE.

Subscribed and sworn to before me this 6th day of December, 1915, at Taft, California.

[Seal]

R. B. WHITEMORE,

Notary Public. [66]

Affidavit of Silas L. Gillan.

United States of America,
Northern District of California,
State of California,—ss.

Silas L. Gillan, being duly sworn, on oath deposes and says:

I am a citizen of the United States over the age of 21 years. I am a graduate mining engineer and during most of the period of the last five years I have been engaged in the California oil fields as a mineral inspector of the General Land Office of the United States, and as such have examined and reported to said General Land Office as to the conditions of, and development work being carried on in, said oil fields.

I visited the NW. $\frac{1}{4}$ of Section 28, Township 31 South, Range 23 East, M. D. M., on the 7th day of December, 1915. At said time I found on said quarter section, three wells producing oil and one well producing gas. From one of said wells oil was be-

ing pumped and from two of said wells oil was flowing without being pumped.

SILAS L. GILLAN.

Subscribed and sworn to before me this 9th day of December, 1915.

C. W. CALBREATH,
Deputy Clerk U. S. District Court, Northern District of California. [67]

2. **AFFIDAVITS OFFERED BY DEFENDANTS J. M. McLEOD AND CONSOLIDATED MUTUAL OIL COMPANY.** [68]

Affidavit of J. M. McLeod.

United States of America,
Southern District of California,
Southern Division,
County of Los Angeles,—ss.

J. M. McLeod, one of the defendants above named, being first duly sworn, deposes and says:

1. That he resides at Los Angeles, California, and that his postoffice address is 519 W. P. Story Building, in that city.

2. That it is not true, as alleged in paragraph II of the complaint, that for a long time prior to or on the 27th day of September, 1909, or at any time since said date, the plaintiff has been or now is entitled to the possession of the petroleum or mineral oil or gas lands particularly described in paragraph II of said complaint, or of the oil, or petroleum gas, or other minerals contained in said land;

2a. It is not true that the President of the United

States on the 27th day of September, 1909, or at any time, withdrew or reserved all or any part of the land in the complaint described, from mineral exploration or from location, settlement, selection, filing entry, patent occupation, or disposal under the mineral or nonmineral laws of the United States. It is not true that since said date or at any time said lands have not been subject to exploration for mineral oil, petroleum or gas, or occupation, or the institution of any right under the public land laws of the United States.

3. It is not true that in violation of the proprietary or any rights of the plaintiff, or in violation of the laws of the United States or lawful orders or proclamation of the President of the United States, or in violation of the order of withdrawal of September 27, 1909, [69] the defendants or any of them entered upon said land at any time subsequent to the 27th day of September, 1909, for the purpose of exploring said land for petroleum or gas, but, on the contrary, he states the fact to be as hereinafter set forth.

4. It is not true that the defendants had not acquired any rights on or with respect to said land on or prior to September 21, 1909. It is true, as alleged in paragraph VI of the complaint, that after the order of withdrawal of September 27, 1909, there was produced petroleum and gas from said land, but it is not true that entry upon said land for the purpose of producing said petroleum or gas was made subsequent to September 27, 1909, but, on the con-

trary, such entry was made thereon in conformity with the mining laws and regulations of the plaintiff, prior to said date, and that at said time deponent and those claiming through him were *bona fide* occupants of said land, and were then actually engaged in the diligent prosecution of work thereon, looking to the discovery of oil or gas therein, and such work was continued diligently and in good faith thereafter until such discovery.

5. It is not true as alleged in paragraph VII of the complaint, that the defendants or any of them are trespassing upon said land or any part thereof. It is not true, that any oil or gas is being wrongfully sold or converted, or has at any time been wrongfully taken, sold or converted by any of the defendants from said land or any part thereof; neither is it true that any trespassing or waste has been or will be committed on said land or any part thereof, to the irreparable or any injury of the plaintiff. Responsive to said paragraph VII of the complaint, deponent states that he is not advised as to the policies of the plaintiff with respect to conservation, use or disposition [70] of said land, or the petroleum oil or gas contained therein, except as such policies are indicated by the mining laws and regulations of the complainant, and as to such laws and regulations deponent and his predecessors in interest in said land have in all respects and at all times fully complied therewith.

6. It is true that deponent claims a right in and to said lands, and in and to the oil, petroleum and

gas extracted therefrom, and to the proceeds thereof. It is not true that such claim is derived directly or otherwise from any pretended notice or notices of mining locations, or by conveyances, contracts or liens, directly or otherwise from any pretended location, but, on the contrary, such claim is based upon the facts hereinafter stated.

7. It is not true that none of the defendants, nor any person or corporation from whom they have derived any interest in said lands, was on the date of the order of withdrawal on the 27th day of September, 1909, a *bona fide* occupant or claimant of said lands, or in the diligent prosecution of work leading to the discovery of oil or gas therein, but the fact is as herein otherwise stated.

8. It is not true as alleged in paragraph XI of said complaint, that the location notice therein referred to was filed or posted by or for the sole or any benefit of this defendant, or for the benefit of someone else other than the persons whose names were used in said location notice. It is not true that the names of said locators were used to acquire more than twenty acres of mineral land in violation of the laws of the United States. It is not true that the names used in said location notice were not *bona fide* locators or that any of them was without any interest in said location notice; it is true that [71] their names and each of them were used to enable them and each of them to secure said land or patent therefor; it is not true that any of said persons was a dummy, but on the contrary, said location was

made by the persons in said location mentioned, in good faith, by and for the mutual benefit of said locators, and in conformity with the mining laws of the United States.

9. It is not true, as alleged in paragraph XII, that the defendants have no right, title or interest in or to said land or any part thereof, or any right, title or interest in or to the petroleum, mineral, oil or gas deposited therein, or any right to extract the petroleum or mineral oil or gas from said land, or to convey or dispose of the petroleum or gas so extracted, but, on the contrary, deponent states that by virtue of the complainant, he is now, and at all times since said mesne conveyance has been, and his predecessors in interest were, lawfully entitled to the possession of said premises, and every part thereof and that such of the codefendants claiming by or through this defendant are likewise entitled to the possession of said land, and to the minerals contained therein, and to the proceeds thereof.

As a further response to said application for receiver, deponent states that prior to January 1, 1909, the land in the complaint mentioned, to wit, the northwest quarter of Section 28, township 31 south, range 23 East, M. D. B. & M., in Kern County, California, was public land of the United States, open to location and appropriation under the laws of the United States relating to lands commonly known as "placers," and on said date Herbert M. Walker, H. E. Bashore, R. B. Welch, F. H. Roamine, Jr., W. A. Keenan, C. Rupert Walker, Eugene Metz and

William [72] Mahn, each being then a citizen of the United States, duly located, according to the mining laws and regulations of the United States, and the laws of the State of California, said northwest quarter of said section 28, as the Texas Placer Mining Claim, by marking said claim upon the ground so that the boundaries thereof could be readily traced, by recording a notice of such location, and by entering into the occupation of said land and every part thereof. That thereafter deponent by mesne conveyances duly executed and delivered, for value and in good faith, succeeded to the rights of said locators, and became and now is the record legal owner of said lands and of the whole thereof.

That since said first day of January, 1909, deponent and his predecessors in interest have held, possessed and improved the land above described under the mining laws aforesaid, claiming openly, notoriously and continuously to own the same, exclusive of the rights of all other persons, and adversely thereto; that during all of said time, deponent and his predecessors in interest have paid all the taxes, State, county and municipal, which have been levied and assessed upon said land.

That on and for a long time prior to the 27th day of September, 1909, deponent and his predecessors in interest were, and ever since said date have been, *bona fide* claimants and occupants of said land, in the diligent prosecution of work leading to discovery, and to the development and production of petroleum or gas therein. That said work was commenced by lessees and claimants under deponent in or about the

month of [73] August, 1909, and was thereafter diligently continued thereon. That for the particulars of such development work, and especially as to the particulars with respect to the efforts and expenditures of said occupants in obtaining a supply of water with which to operate said claim, deponent refers to the affidavit of the codefendant filed herewith. That said lands were and are situate in a desert country, far from any source of water supply, and in the year 1909, and prior and subsequent thereto, human existence thereon was precarious and the pursuit of any drilling or other operations impossible without an assured supply of water. That long prior to the 27th day of September, 1909, and during said year 1909, work was commenced and proceeded with by affiant and those claiming under him, which was adapted to and intended for the drilling for and development of oil upon said premises, which were and are oil-bearing lands; that said work was proceeded with to the utmost extent possible without further supply of water, and that affiant and his associates on or about the first day of September, 1909, and prior thereto, and continuously thereafter, diligently, energetically and vigorously, and by every means within their power, labored toward the procurement and transportation to said land and making available thereon of sufficient water to proceed with the work so commenced thereon as aforesaid, and that everything done by affiant and his associates and those claiming under him, toward the procuring of said water supply, was with the purpose and in-

tention of making water available, and such water was thereby made available for the continuance of the drilling for and development of oil on said premises.

That affiant on or about the 25th day of June, 1909, made an agreement with James W. Mays covering a certain portion of [74] the premises described in the complaint herein, and at the time said agreement was made, this affiant was familiar with all the conditions surrounding the said property and the difficulties to be surmounted in proceeding with development work thereon; that at the time of the making of said agreement this affiant was anxious that the work of exploring and drilling for oil upon said premises, and particularly the portion thereof described in said agreement made with said James W. Mays, should be proceeded with with the utmost dispatch and that affiant kept closely in touch with the operations of the said Mays, and continuously and constantly insisted that the development work upon said property should be diligently proceeded with, and affiant states that said work was so proceeded with by the said Mays with the utmost diligence possible under the circumstances then existing, and in view of the great difficulties encountered, and particularly in view of the difficulty of obtaining a supply of water adequate for the purpose of proceeding with drilling; that the same diligence which characterized the conduct of said Mays also characterized the operations of the successors of said Mays under said contract aforesaid.

That prior to and at the time of the passage and approval of the Act of Congress entitled, "An act to authorize the President of the United States to make withdrawal of public lands in certain cases," approved June 25, 1910 (Chap. 421, U. S. Stats., p. 847), the development work above referred to was actually and actively being carried on upon said land under the *bona fide* location claims aforesaid, and was diligently continued to completion and discovery of oil upon said placer location. [75]

That on the northwest quarter of said section 28, three wells were drilled, one 2,978 feet deep, one 3,430 feet deep and one 2,884 feet deep; that in and by two of said wells drilled as aforesaid, a deposit of petroleum was discovered and developed; that in and by the third well drilled as aforesaid, a deposit of gas was discovered and developed, which for a time produced gas at the rate of about 1,600,000 cubic feet per day, but which at the time of the application for patent hereinafter mentioned, had decreased and then produced not in excess of 900,000 cubic feet per day. That deponent through said agencies expended upon said northwest quarter of said section twenty-eight in and about the development of said oil and gas, a sum in excess of \$95,000.

That the entry aforesaid, and the development of said land, were made with the full knowledge of the complainant herein;

That heretofore, and in or about the month of June, 1914, deponent filed in the United States Land Office at Visalia, California, his application for pat-

ent, embracing the quarter section in the complaint described, and also other land, which proceeding was entitled, "In the Matter of the Application of J. M. McLeod for patent to the Texas Consolidated Placer Mining Claim, embracing the northwest quarter, the northeast quarter and the southeast quarter of section 28, township 31 south, range 23 east, M. D. B. & M. in Kern County, California, and containing an area of 480 acres," which application was designated as Mineral Entry, Serial No. 04655. That notice of said application was published by the Register of said land office as required by law. That deponent complied with the mining laws and regulations of the complainant in that behalf enacted, [76] filed his application in said land office to purchase said premises, and paid to the Register of said land office the amount of the purchase price thereof provided by law; that thereafter and on the 31st day of October, 1915, there was issued to deponent by Frank Lanning, Register of the said United States Land Office, his final certificate in words and figures following:

REGISTER'S FINAL CERTIFICATE OF
ENTRY.

SERIAL NO. 04655.

RECEIPT NOS. 1270754.

RECEIPT NOS. 1493022.

DEPARTMENT OF THE INTERIOR.

UNITED STATES LAND OFFICE.

At Visalia, California, October 31, 1914.

Mineral Entry, No. 04655.

IT IS HEREBY CERTIFIED That in pursuance of the provisions of the Revised *States* of the

United States, Chapter VI, Title XXXII, and legislation supplemental thereto, J. M. McLeod whose postoffice address is 519 W. P. Story Building, Los Angeles, California, by U. T. Clotfelter, his attorney, whose postoffice address is 409 Kerkhoff Building, Los Angeles, California, has this day purchased those placer mining claims known as the:

TEXAS CONSOLIDATED PLACER MINING CLAIMS; embracing the NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of Sec. 28 T. 31 s., R. 23 E., M. D. M.

Said placer claims as entered, embracing 480 acres in the County of Kern, State of California, as shown by the plat and field-notes of survey thereof, for which said party first above named this day made payment to the REGISTER in full, amounting to the sum of Sixteen Hundred (\$1600) Dollars. [77]

NOW, therefore, be it known that upon the presentation of the CERTIFICATE to the COMMISSIONER of the General Land Office, together with the plat and field-notes of survey of said claims and the proofs required by law, a PATENT shall issue thereupon to the said J. M. McLeod, if all be found regular.

(Signed) FRANK LANNING,
Register.

Visalia, California, October 31, 1914.

I HEREBY CERTIFY, THAT the issuance of this final certificate was delayed from September 19th, 1914, till October 31, 1914, by reason of an erroneous understanding on the part of the undersigned

that the affidavit of publication had not yet been filed in this matter.

FRANK LANNING,
Register.

That said certificate has not at any time since been revoked, but is in full force and effect.

J. M. McLEOD.

Subscribed and sworn to before me this 27th day of December, 1915.

BERTHA TRAWEEK,
Notary Public in and for the County of Los Angeles,
State of California. - [78]

Affidavit of Alfred G. Wilkes.

State of California,
City and County of San Francisco,—ss.

Alfred G. Wilkes, being first duly sworn, deposes and says:

I became a director of the Mays Oil Company on the 16th day of March, 1909. I continued to be such director thenceforth and during the month of September, 1909, and was such director on the 27th day of September, 1909, the date of the so-called "Taft Withdrawal." I was thoroughly acquainted with and familiar during all of said time with Section 28, Township 31 South, Range 23 East, M. D. B. and M. and had and have actual knowledge regarding the possession thereof and with the work that went on on said section during the whole of said period, and particularly with the nature and extent of the work that was actually in progress on said section upon the date of the said Taft Withdrawal, to wit, Sep-

tember 27, 1909. I was also acquainted with the facts regarding the possession of said section, and knew that the work that was done on said section after said order of withdrawal was made and up to the end of October, 1909.

The said Mays Oil Company from and after the 25th day of June, 1909, was in the actual, peaceable and exclusive possession of all of said Section 28, save and except the north half of the northwest quarter, and the south half of the southwest quarter of the said section;

That said Mays Oil Company was organized in the early part of March, 1909. It acquired the possession of the aforesaid portions of the said Section 28 by virtue of a lease dated June [79] 25, 1909, executed by one J. M. McLeod to one James W. Mays, who was the attorney of said Mays Oil Company, and who held said lease for the benefit of said Mays Oil Company. A synopsis of said lease is hereunto annexed, marked exhibit "A," and is hereby referred to for further particulars.

That deponent as such Director of the Mays Oil Company was thoroughly familiar with and knew the intentions of the said corporation, and knows that it was the intention of the said corporation from the moment it acquired its aforesaid leasehold interest in said property to proceed diligently with the sinking of an oil well upon each of the four quarters of said section;

That to that end, and for the purpose of drilling said wells economically, it was planned by said Mays

Oil Company that bunk-houses, cook-house, etc., and the pipe-line to bring water for the drills, should be so constructed and situated near the center of the said Section 28 that the work of drilling the said four proposed wells might be carried on from the one camp;

That not only was it the intention of said corporation to proceed as aforesaid for its pecuniary benefit, but it was bound so to do by the terms of the lease under which it held said property. In and by the said lease it was covenanted and agreed that the lessee would, on or before the 12th day of July, 1909 "erect a suitable derrick for drilling an oil well upon the following four parcels of land, to wit: S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Section 28, Township 31 South, Range 23 East, M. D. B. & M. and will within said period erect all bunk-houses that may be necessary for the drilling operations on said parcels of land required by this agreement." It was further provided in said lease that "on or before the 12th day of August, 1909, said party shall install a complete [80] standard drilling outfit including rig and tools at one of said drilling outfit, commence the actual work of drilling for oil with said rig and tools at the point where the same is installed as hereinabove provided, and will continue drilling operations diligently with rig until oil is struck in quantities deemed paying quantities by the second party, or further drilling becomes useless or unprofitable in the judgment of the second party."

That pursuant to the said obligations contained in said lease, the said Mays Oil Company proceeded with the work which the lessee had agreed to perform, and which it as aforesaid had planned to do. To that end a suitable skeleton derrick for drilling an oil well was erected upon each of the said four parcels of land, and all buildings and structures necessary as a camp and plant for the drilling operations on said four parcels of land were constructed.

It was obvious at the time that the said lease was taken by the said Mays Oil Company that it would not be possible to drill more than one well at a time, because of the condition of the water supply in the said district at the said time. The only available water as aforesaid was that supplied by a concern called the Stratton Water Company;

That at the time said Mays Oil Company took said lease, and during all of the period of time between the entry of the said Mays Oil Company upon the said Section 28 as aforesaid in June, 1909, and the 31st day of October, 1909, the said Stratton Water Company had but three producing water wells, two of which were of but little value, and that, as deponent has since learned, the total quantity of water which the said wells were [81] capable of producing during all of said period did not exceed 3,300 barrels per 24 hours, whereas, the demand upon said wells was largely in excess of said supply;

That at the time of the entry of said Mays Oil Company into possession of said portions of said Section 28 in June, 1909, said Stratton Water Company was already attempting to supply customers

whose demands were far in excess of the possible supply of the said wells, and said Mays Oil Company well knew that without more water than it was possible to then get from said Stratton Water Company, it would be a very difficult task to drill even one well, although the utmost care and the most economical use possible of such water as it could obtain from said Stratton Water Company should be taken and made;

That the wells of the said Stratton Water Company were situated about five miles from the center of the said Section 28, and that there was no other natural water supply of any kind or character from which Mays Oil Company could have purchased or otherwise procured water for drilling purposes anywhere within forty-five miles, or thereabouts, of the said Section 28;

That during all of the said period of time, in order to procure sufficient water even for drinking and cooking purposes, it was necessary to send a distance of seven miles from said section, and haul the same by teams to the said camp on said section;

That the conditions regarding water for use on said Section 28 were well known both to said McLeod, the lessor, and to said Mays, and to said corporation Mays Oil Company at the time said lease, exhibit "A," was made; [82]

That by diligent effort a standard drilling outfit was completed as called for by said lease in the early part of August, 1909, and drilling was commenced in August, 1909, on the North half of the Southwest quarter of said Section 28, and was proceeded with

so that by September 1, 1909, the said well was down 290 feet; on September 5, 1909, the same was down 590 feet; during the following week ninety feet were drilled, and between September 12th and September 30, 1909, an additional 170 feet were drilled. The total depth of said well on September 30, 1909, was about 850 feet;

That during all of said time it was the hope and expectation of the said Mays Oil Company that the water supply of the said Stratton Water Company would be increased, the said Stratton Water Company having made repeated representations to that effect to the said Mays Oil Company;

That among the representations so made was the representation that the said Stratton Water Company was installing at great expense a new compressor which would "mean better service for everybody," and that the boiler plant of the said water company was to be replaced with three 100-horsepower, high-pressure boilers, and deponent learned that during the said period of time ending as aforesaid with the 31st day of October, 1909, the said Stratton Water Company was in fact making diligent efforts to increase its water supply. That because of the fact that the said corporation represented itself to be making great outlays in that direction, and that it would be able to increase the said supply, the Mays Oil Company hoped and believed that the said water supply would be increased, and it was at that time the intention of the said Mays Oil Company, as fast as the said water supply was increased, to start in and drill more

wells [83] upon the said section at the places where skeleton derricks had been erected as aforesaid;

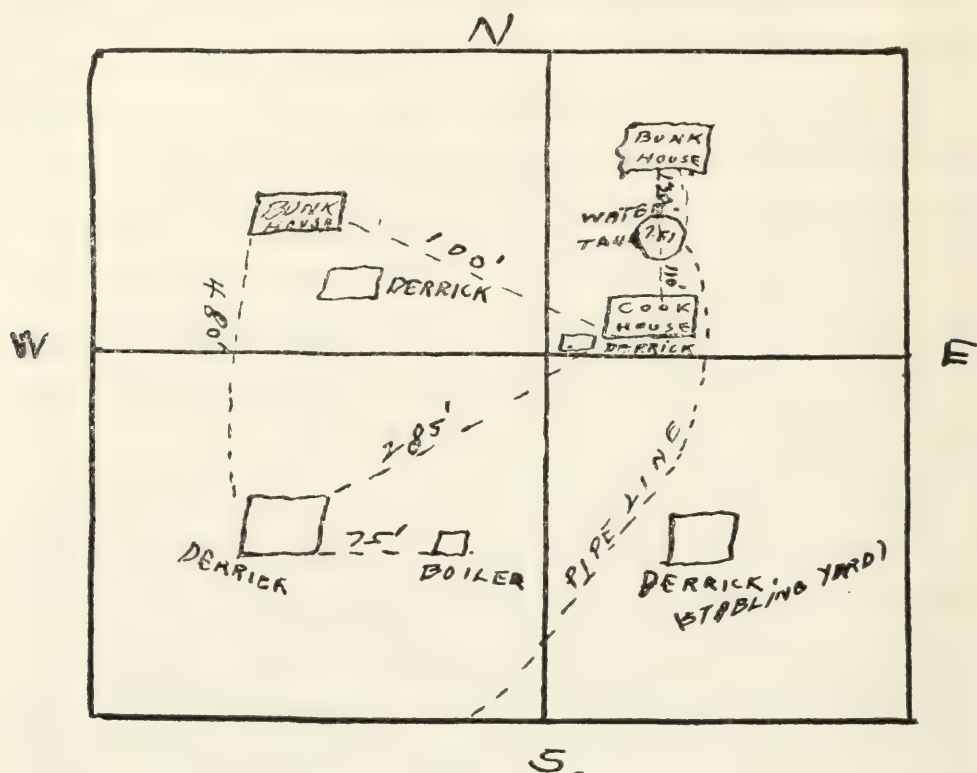
That the said skeleton derricks so erected were suitable for the purpose and were ready for rigging, and that it was the intention of said Mays Oil Company to properly equip and make use of each of said derricks, and to drill wells with the same just as fast as it could procure sufficient water for the purpose, but in the event that it was not possible to secure a further water supply than was sufficient for drilling one well at a time on the said Section 28, then it was the intention of said corporation to finish said first well, and thereafter to use the said water supply immediately in the work of drilling a second well, and so on, not only until the said four wells were drilled and completed, but thereafter as rapidly as wells additional to the said four wells could be drilled. It was at that time estimated that oil in paying quantities would be discovered in such well in from thirty to ninety days after drilling should commence;

That it would have been an easy matter for the said Mays Oil Company, and those under whom it claimed, had it or they been proceeding in bad faith, or had it or they desired to make a mere showing of work in lieu of real development work, to have rigged up said three additional derricks and have drilled four wells of 200 feet depth, or thereabouts, in the same period of time prior to the said 27th day of September, 1909, in which it as aforesaid drilled said 850 feet, or thereabouts, in the said one

well, but that at no time did the said Mays Oil Company, or those under whom it claimed, intend or attempt to make any mere showing of work; but said company was proceeding actually in good faith in its own behalf, and in compliance with the obligations to those under whom it claimed, with all of the rapidity possible under the circumstances as to water in the actual development of the said property; [84]

That the tract of land so leased to the said Mays Oil Company in said Section 28 was in the actual *bona fide*, exclusive possession and occupancy of the said Mays Oil Company prior to and on and after the said 27th day of September, 1909; that at the moment when said Taft Withdrawal order was made, the said company was in diligent prosecution of work leading to the discovery of oil on said whole tract, and on each and every governmental subdivision contained therein.

The following is a map upon which is depicted with approximate accuracy the four quarters of the said section, and the following structures which were existing on the said land at the date of the said Taft Withdrawal:



[85]

1. In the southwest quarter of said section, near the center thereof, was the aforesaid standard derrick complete. Drilling had been going on there for about a month, when said Taft Withdrawal was made. There was also thereon the pipe-line aforesaid which connected with the said Stratton wells about four miles to the southwest, which said pipe-line continued also into the east and north half of the said section. There was also a return pipe-line leading from or near the boiler near said derrick to the tank hereinafter referred to, which was in the northeast quarter of said section.

2. In the northwest quarter of said section there was a bunk-house in which some of the men engaged upon the said work had their beds, and where they slept. There was also the aforesaid skeleton derrick in place and properly set up, and ready to be rigged with the necessary tools for drilling; that said skeleton derrick could have been rigged with tools and started within from one to four days' time, had there been sufficient water.

3. On the northeast quarter there was a tank into which the aforesaid pipe-line extended and discharged, and there was as aforesaid a return pipe-line toward the said oil well. There was also a similar skeleton derrick all set up and ready to be rigged up and used. There was also a cook-house, consisting of a kitchen, dining-room and bedroom. In this building the food of the crew engaged in drilling was prepared, and they had their meals there. Said cook-house was constructed and completed in August, 1909, and was purposely constructed with capacity to accommodate forty men, or thereabouts, and with the expectation that as the said work progressed the crews to be employed in drilling the various proposed wells would number as high as forty men. There was also another bunk-house in which some of the crew slept. [86]

4. On the southeast quarter there was the skeleton derrick erected as aforesaid, all set up and ready to be rigged for drilling. The said pipe-line also crossed into said southeast quarter. The teams hauling freight to the camp were put up and fed on said quarter near said derrick, and the same was

also used as a stabling-yard for the company's team.

That on the said 27th day of September, 1909, there were six men actually employed by the said Mays Oil Company upon said property, and actually living thereon and occupying and using the said buildings and premises;

That in addition to the said six men, there were teamsters employed by the company as they were needed in hauling provisions and freight to and from the grounds, and these teams and their drivers often remained over night at the camp;

That the said company at the date of said Taft Withdrawal was expending a large amount of money, and intended to continue to expend a large amount of money in the development of the said properties so leased to it, and had actually expended in physical structures, equipment and labor on the said work between the time that the said work commenced and the date of the said Taft Withdrawal about Twenty Thousand (\$20,000) Dollars;

That no other person or persons were in occupation of the said lands, and the said Mays Oil Company had the actual *possessio pedis* thereof;

That the tools, supplies and appliances were adequate for the work; that the only thing inadequate or short was the water supply, and that the said water supply was utilized to the fullest extent possible in the sinking of the said well, and the same, so far as it had gone on September 27, 1909, had been successfully sunk without serious mishap or delays from the time that the said drilling began as aforesaid; [87]

That the men employed were skillful men, and were paid high wages for their services, and the driller, prior to said 27th day of September, 1909, was offered and subsequently paid a large bonus in stock of the corporation for his successful work, said bonus being offered to induce him to diligent effort;

That the four wells which as aforesaid it was proposed to sink as rapidly as the water supply would permit were all to be sunk within a stone's throw of the center of said section, and each would have used, and later on did use, the water supplied through said pipe-line.

Upon the question of diligence, this deponent further says that the work which the said Mays Oil Company was diligently prosecuting on said section was work "leading to the discovery of oil" on each of the said four quarters of said section at the time of the making of the said Taft Withdrawal order. In that behalf this deponent further says:

That the instructions of the said Mays Oil Company to its employees during all of the said times had been and were to proceed with the utmost diligence in the sinking of the said well in the south-east quarter of Section 28, and the drilling of the said well was in fact proceeded with just as diligently and as rapidly as work of that character could be proceeded with in view of the unsatisfactory water supply;

That it was believed by the said Mays Oil Company that oil would be found in each proposed well, but this could not be definitely determined until a discovery in one of said wells was made. A dis-

covery of oil in the well where said drilling was in progress on September 27, 1909, in paying quantities, would for all practical purposes have made it certain that each of said four quarter sections contained oil, and the labor being done on said lands on said day tended to the development [88] of the whole thereof, and tended to determine their oil-bearing character;

That at no time during the said work was the failure to proceed with drilling on each of the said quarter sections due to any other reason than the one fact as aforesaid that the water supply was inadequate. That said company had the means to keep up and equip all four of said skeleton derricks and to do the necessary drilling; it had the belief that the oil was there; it had the desire to develop it as quickly as possible; the market was satisfactory, and offered large profits to the company if oil could be discovered in paying quantities, and it was the earnest effort of the said corporation during all of said time to proceed with drilling upon all four of the quarters of the said Section 28, and the said drilling would in fact have been proceeded with, and would have been in actual progress on each of the said four quarter sections of said section at the time of the said Taft Withdrawal but for the aforesaid shortage of water; that as it was, the said Mays Oil Company was doing the utmost that was physically possible in the prosecution of work leading to a discovery of oil upon all of the four quarters of the said Section 28 at the time that the said Taft Withdrawal went into effect;

That the same diligence continued, and the same state of affairs as to possession, expenditure and drilling continued in the same manner after the said Taft Withdrawal as during the months previous thereto, and the possession of the said company of all of said lands so leased to it continued to be exclusive, and the occupation and use of the said lands by the said company continued in the same good faith, and was accompanied by a very large expenditure and outlay of money continuously until the end of October, 1909, at which time Mr. Charles A. Sherman took [89] charge of the property in behalf of the corporation;

That at the said time, this deponent ceased to have any connection with the management of the said property, but deponent was frequently upon said property during several months after Mr. Sherman's arrival, and observed that work thereon was being proceeded with in the same diligent and continuous fashion as formerly.

(Signed) ALFRED G. WILKES.

Subscribed and sworn to before me this 27th day of December, 1915.

ALICE SPENCER,

Notary Public in and for the City and County of
San Francisco, State of California. [90]

Exhibit "A."

J. M. McLEOD,

First Party,

to

JAMES W. MAYS,

Second Party.

Dated: June 25, 1909.

Recites: For and in consideration of the sum of \$1.00, Gold Coin of the United States to him in hand paid by the second party, receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter expressed and by the second party to be kept and performed, the first party has demised and leased and does hereby demise and lease to the second party the land situate in Kern County, State of California described as the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$; the NE. $\frac{1}{4}$, the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of Section 28, Township 31 South of Range 23 East, Mount Diablo Base and Meridian, and have granted, demised and leased and by these presents does grant, demise and lease to the second party all the oil, gas and other hydro-carbons and minerals of every kind and character whatsoever in and under said lands with covenants of general warranty for the quiet enjoyment and peaceable and exclusive possession of the premises by the second party and that the first party has the sole right to convey the premises with the exclusive right to construct and maintain telephone, telegraph and pipe-lines and roadways leading from adjoining lands on and across the prem-

ises, the right to erect and maintain buildings, derricks and other structures useful and necessary for boring, drilling and excavating, for handling oil, gas and other hydro-carbons on said premises and the right to the free use of sufficient water, gas, oil and hydro-carbons from the premises for the proper operation of the lands herein leased and the right to remove during, or after the term of this lease and grant, all [91] the machinery, tools, pipes, tanks, appurtenances and property placed or erected thereon by the second party.

To Have and to Hold, to the second party the whole or any part of said premises for the term of twenty years from the date hereof and as much longer as oil is produced therefrom in quantities deemed paying quantities by the second party.

The second — agrees on or before the 15th day of July, 1909, to erect a suitable derrick for drilling an oil well upon the following four parcels of land, to wit:

S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Section 28, Township 31 South, Range 23 East, M. D. B. & M. and will within said period erect all bunk-houses that may be necessary for the drilling operations on said parcels of land required by this agreement.

On or before the 12th day of August, 1909, said party shall install a complete standard drilling outfit including rig and tools at one of said derricks on Section 28, and shall promptly upon the installation of said drilling outfit, commence the actual work of

drilling for oil with said rig and tools at the point where the same is installed as hereinabove provided and will continue drilling operations diligently with rig until oil is struck in quantities deemed paying quantities by the second party or further drilling becomes useless or unprofitable in the judgment of the second party.

The second party further agrees that within thirty days after oil is discovered in quantities deemed paying quantities by the second party in either of said wells *it* will begin the actual work of drilling for oil on each of the three remaining halves of quarter sections of the section in which such discovery is made and at the points where the three remaining derricks [92] on said sections have been erected as hereinabove provided and will continue such drilling diligently until oil is struck in paying quantities deemed such by the second party or further drilling becomes in the judgment of the second party useless or unprofitable.

The first party further agrees that upon the discovery of oil in quantities deemed paying quantities by the second party upon any quarter section of land hereinabove described, the first parties will immediately make or cause to be made application to the Government of the United States for Letters Patent to said quarter section of land and will pay one-half of all expenses of every kind which may be incurred in procuring such patent; and in the event of the failure of the first party so to do, the second party shall be and hereby is authorized on behalf of the

first party, to apply or cause application to be made for such patent at the expense of the first party.

The second party shall deliver to the first party the one-eighth part of all oil produced and saved from said lands or from any part thereof prior to the purchase thereof by the second party pursuant to the option herein granted. Delivery shall be made upon the party of the land credited with the royalty.

The second party agrees that so long as any of said lands are operated by him under and pursuant to this lease he will pump diligently all producing wells except when the value of oil shall be less than forty cents a barrel at the well and except when in the judgment of the second party, the quantity of oil produced by such pumping operations is not sufficient to justify the continuance of such pumping.

It is further understood and agreed that the drilling operations of the second party hereunder shall be suspended at the option of the second party, if at any time the value of oil [93] shall be less than forty cents a barrel at the well, or if the quantity of oil produced from producing wells on said lands or any part thereof shall be such that in the judgment of the second party further development of said lands shall be unprofitable.

Except as herein otherwise provided, the second party shall have the right to remove during the life of this agreement or within ninety days after the termination thereof by giving sixty days written notice, all the machinery, tools, pipes, tanks and appurtenances and property placed and erected thereon by the second party.

The second party shall have the right to surrender all or any one or more of the four parcels of land above described at any time within one hundred and twenty days after a first well drilled by the second party on any of said parcels of said land has commenced pumping. And the second party shall have the option at any time within any such one hundred and twenty days of purchasing all or any one or more of the above described four parcels of land at the purchase price of \$250 per acre.

The second party shall have the further option of designating at any time within any one hundred and twenty days after a first well on any one of said four parcels has commenced pumping, whether it elects to continue this lease as to such parcel or as to all or any of the parcels herein described and thereafter the second party shall have the option at any time during the term of such lease to purchase the parcel or parcels as to which it has so elected to continue said lease, at the purchase price of \$250 per acre. Upon the purchase of any parcel or parcels of said land this lease shall forthwith cease as to such parcel or parcels.

In the event that the second party surrenders the lands herein demised or any parcel thereof, the first party shall have [94] the right to purchase the inside casing of any well on any of said parcels of land at seventy-five per cent of the cost of such casing on the land, and before installation in the well, provided, however, that the first party as a condition of the right to purchase said casing shall within ten

days after receipt of written notice of surrender of the second party of said parcel or parcels, signify his intention to exercise the option to purchase said casing.

The second party agrees during the term of this lease, acts of the elements, the public enemy, strikes or other inevitable causes excepted, to run one string of tools continuously, and finish an average of one well each year on each the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, and one well on the balance of said lease on said Section 28, held by the second party pursuant to this lease until there shall be on each five acres of land so held one well; provided that nothing herein contained shall prevent the second party from drilling as many wells as he may elect on any parcel of said land.

The first party shall and hereby covenants and agrees upon the written demand of the second party made at any time within one hundred and twenty days after the first well has commenced pumping on any of said parcels and after final receipt by the United States Government shall have been issued in any patent application or applications prosecuted for such parcel, to convey to the second party by good and sufficient deed free of encumbrances such parcel upon the payment to the first party by the second party for the same at the rate of \$250 Gold Coin of the United States for each acre of land so purchased by the second party in the exercise of its option under the provisions of these presents.

This agreement and the rights and obligations

thereof shall [95] inure to and bind the respective successors and assigns of the parties hereto.

(Signed) J. M. McLEOD, (Seal)

(Signed) JAMES W. MAYS. (Seal)

Per A. G. WILKES,

Atty. in Fact.

Acknowledged in due form June 25, 1909, before C. L. Clafin, Notary Public, Kern County, California (no seal), by J. M. McLeod; also on said day before same officer (no seal), by A. G. Wilkes, as attorney in fact of James W. Mays. [96]

Affidavit of Charles H. Sherman, December 27, 1915.

State of California,

City and County of San Francisco,—ss.

Charles H. Sherman, being first duly sworn, deposes and says:

On or about the 27th day of October, 1909, I arrived in the State of California from the East, and on the 30th day of October, 1909, I was upon Section 28, Township 31 South, Range 23 East, M. D. B. & M.;

At the said time I was employed by the Mays Oil Company as its general manager, and went upon the said section upon said date in the interests of said company, and as such general manager;

At the time of my arrival upon said section the said company was in the actual possession of a tract of land embracing the following described portions of said section, to wit: The Northeast quarter, the South half of the Northwest quarter, the North half of the Southwest quarter, and the Southeast quarter;

I went completely over the said properties and examined the boundaries thereof, and know that the said Mays Oil Company was on said day in the actual, peaceable possession thereof, claiming the same under James W. Mays, J. M. McLeod, and their predecessors in interest;

That on said day there were employees of the said Mays Oil Company other than myself living and working upon each and all of said governmental subdivisions which made up said tract of land;

That the said governmental subdivisions were contiguous and that the possession of the said corporation, Mays Oil Company, on said day and ever thereafter was peaceable, open and [97] notorious and was not interfered with adversely at any time by any other person or corporation and that the same was a *bona fide* possession under a title founded upon written instruments purporting to convey the title;

That during the whole of said period from and after the arrival of deponent upon said property until the said Mays Oil Company disposed of its said holdings there were officers, laborers or employees of said corporation in physical possession of said property;

That from and after deponent's arrival upon said property he took charge of said premises and was upon each and every one of the aforesaid governmental subdivisions of said tract of land daily during the whole of the said period;

That until deponent's arrival on said property one Alfred G. Wilkes was the managing director of said

property and in charge of the said property for said Mays Oil Company, and by the direction of the said Wilkes the possession thereof was delivered to this deponent as manager of said Mays Oil Company on the said date of deponent's arrival;

That the tracts of land hereinabove described, to wit: the northeast quarter, the south half of the northwest quarter, the north half of the southwest quarter, and the southeast quarter, of said Section 28 constituted a contiguous parcel of land made up of the aforesaid subdivisions and that the possession of said corporation, Mays Oil Company, extended to each and every part of the said parcels;

That at the time of deponent's said arrival upon the said tract of land there were situated thereon the following described structures: two skeleton derricks, one derrick fully rigged, equipped and in operation; two bunk-houses, one cook-house consisting of a bedroom, kitchen, and dining-room, the latter capable of accommodating forty men; a water-tank from [98] which a pipe-line extended for four miles or thereabouts to the wells of the Stratton Water Company, and a boiler, set up and in operation, a 25-barrel fuel-oil tank situate near and used in connection with said boiler. The brush had been cleared away from around the derricks and the different buildings. There was also a road which terminated at the Northeast quarter of said section and which extended thence south through the whole of the Southwest quarter of the said section, which said road was the road leading to the town of Taft about

seven miles distant. There were piles of stove-pipe casing and 12½ inch casing, and a full equipment of drilling tools. At the derrick on the Southeast quarter was the place for stabling the company's team and the teams used in hauling freight to the plant. Hay was stored therein. It continued to be used as a stabling place at all times in 1909 until a building for use as a stable was erected by the company thereon;

That the center of the said section was very near to the properties hereinabove described and that one or more of the structures hereinabove referred to was upon each of the several subdivisions of the said section, and the whole was used as one camp and the possession of the premises was not confined or directed to one fractional subdivision thereof more than to another;

That all of said buildings or structures and said stabling place on such fractional subdivision which went to make up the said tract of land was actually in use in accomplishing the work of drilling upon the said property;

That the well being drilled on the said 30th day of October, 1909, when deponent arrived was situate near the center of Section 28, about 300 feet in a southwesterly direction from said center and was on the north half of the southwest quarter of said section; [99]

That a boiler had been erected and in place near the said derrick over the said well; that one of the bunk-houses was on the south half of the northwest

quarter of said section, and the water-tank, one of the bunk-houses and the cook-house were on the northeast quarter of the said section;

That the crew of men engaged in the said work of drilling the said well used both the said bunk-houses for sleeping purposes and ate at the aforesaid cook-house; that the water then in use was highly impregnated with sulphur, and while good enough for drilling purposes was not good for cooking or domestic purposes, and that in order to get drinking water and water for cooking purposes, it was necessary at said time to either bring the water in in tank-wagons from the town of Taft or to distill the said sulphur water;

That it was the duty of this deponent to keep the said drill running and the instructions given to this deponent were to proceed with all of the diligence possible not only to complete the said well but to drill additional wells not only at the location of the aforesaid skeleton derricks which had been erected on said tract as aforesaid but also to proceed with the erection of further and additional wells as rapidly as water could be obtained and to procure water from any point where the same could be obtained in suitable quantities and at a cost within the bounds of reason;

That at no time after the arrival of deponent in California was the said company short of funds, but on said day and thenceforward there were abundant funds with which to proceed with the said work;

That deponent proceeded immediately to investi-

gate the water situation at the said well and in the said district and [100] to devise means if possible to secure more water for the purpose of drilling. As a result of such investigation deponent learned almost immediately after his arrival upon said section as aforesaid that the supply then being obtained from the said Stratton Water Company was inadequate for the purpose of proceeding properly with the said drilling operations at said one well. That as will hereinafter more fully appear the said well was drilled under great difficulties because of lack of sufficient water; that it reached the depth that it did reach only as a result of the utmost precaution and care in husbanding the water supply that was available and that the said well was ultimately lost because of the insufficient supply of water for drilling;

Deponent further discovered that the total water supply of the said Stratton Company was utterly inadequate to meet the demands upon it of the said district and particularly of customers located nearer to the wells of said water company than was the said Mays Oil Company; that the companies so located had been customers of said water company prior in time when the said Mays Oil Company became a customer;

Deponent further discovered that there was no other water supply in the district, and that in order to pipe water in to the said district from any natural source it would then have been necessary to go a distance of forty miles or thereabouts; that the cost of bringing such water such a distance was prohibitive;

That to the town of Taft situate about seven miles from the said works of the said Mays Oil Company on Section 28 water was brought in for drinking and domestic purposes in tank cars by the Santa Fe Railroad Company and was carried for that purpose a distance of forty miles and upwards to said town of Taft; [101]

That the only other water within said district was brought in by the Santa Fe Railroad Company to a point about eight or ten miles distant from the said Section 28 and was there used by the Santa Fe Railroad Company for its own purposes; that deponent soon after his arrival in the said field called upon the officials of the said Santa Fe Railroad Company and to that end interviewed the employees of the said company in charge of said water, including a Mr. Barber and a Mr. Mays, who were superintendents in charge thereof, and later interviewed Mr. Ripley, son of the president of the said road, who was one of the managing agents in charge of the said water, with a view to purchasing from the said Santa Fe Railroad Company a sufficient water supply to supplement the amount required for satisfactory drilling of the said well then under construction and also to enable the said Mays Oil Company to drill additional wells upon the said tract of land of which it was in possession as aforesaid and operate drills simultaneously at the site of the derricks then upon the said tract of land; that the said Santa Fe Railroad Company refused to sell to or to permit the said Mays Oil Company to have any water whatsoever;

That for months after the arrival of deponent

upon the said property the necessity for water in the drilling operations then in progress at said well were so imperative and the supply so inadequate that this deponent visited said Stratton Water Company almost daily and on some days three or four different times in a day in order to see that every particle of water that could be coaxed or cajoled from the said company should be put into the pipes of Mays Oil Company for delivery at said well;

That at no time thereafter or prior to the year 1911 was any water piped into the said district by any person or corporation; [102]

That the well at the time of deponent's arrival was down about 850 feet and the further work proceeded with increasing difficulty because of the lack of water; that at no time could deponent secure from said Stratton Water Company sufficient water to keep the casing free in the well, with the result that the said drilling was many times stopped because of the lack of water to keep the casing free; that often it was necessary to stop drilling for several hours at a time because of the lack of water; that the shutting down of drilling in a well of that character, where there is not sufficient water to keep the casing free is very dangerous, and is apt to prevent entirely the further drilling of the well, and there finally came a time at or about the end of the year 1909 when the casing became stuck and the entire hole was lost; that this was prior to any discovery of oil therein in paying quantities;

That the loss of said well was due entirely to the lack of water and that at the time the same was lost

it had cost the said company an amount which this deponent believes to be in excess of \$10,000; that during all of the said period of time the Stratton Water Company was making efforts to increase its supply of water; that to that end it was sinking or enlarging its wells, installing a compressor and new boilers, and its officers were repeatedly stating to deponent that they would soon have an increased water supply adequate to satisfy the necessities of the said Mays Oil Company, not only for the drill which was then being operated but for the purpose of drilling its other intended wells;

That deponent acting as manager of said company believed said representations and expected that just as soon as the diligent efforts of the said Stratton Water Company could bring it about, the water company's supply would be increased, and the [103] said water supply of the said Mays Oil Company would be increased through the said Stratton Water Company, to a point where its drilling necessities would be met;

That after the loss of the aforesaid well—the same being the first hole drilled upon the said tract of land—deponent immediately caused a second well to be started; that to that end he retained the boiler in its then position but moved the derrick east a distance of about thirty feet; that the said hole thus started was started on or about the 1st day of January, 1910, and was continued diligently in the same manner and with the same diligence as that which had attended the sinking of the first well;

That the difficulties with water continued during

the year 1910; that as in the case of the said first well, stoppages varying from a few hours to a few days for want of sufficient water occurred; that the said well finally struck oil in paying quantities at a depth of upwards of 3,000 feet; that the work on the said well was proceeded with diligently and without interruption save such as is incidental to all similar work, until the oil in paying quantities was struck thereon sometime in the year 1912; although both oil and gas were struck in the said well long before the same was developed in paying quantities;

That deponent was anxious at all times to begin boring another well, but did not dare to begin such work because of the shortage of water, until March, 1911; that by the said time there had been some improvement in the supply of the said Stratton Water Company, brought about in part by the expenditures which the said Stratton Water Company had gone to upon its property, but chiefly because of the fact that said Stratton Water Company [104] agreed with deponent, acting in behalf of the Mays Oil Company, that it would shut off the supply of certain customers who had failed to pay their water bills, and would give the additional supply thus secured to the Mays Oil Company. Accordingly, deponent, in behalf of the said company, caused the water pipe-line to be extended to a point near the north line of the south half of the north half of the northeast quarter of said Section 28 near the northeast corner of said section, and began diligently the drilling of said well at the first moment that water could be obtained for the said purpose from the said

Stratton Water Company in sufficient quantities, in addition to that already obtained, to make it possible to run two rigs simultaneously; and also, preparatory to further drilling on said northeast quarter, deponent caused a tank to be built near the north line of the said quarter, and extended the said pipeline to the said tank, and built a return gravity pipeline to the said derrick; that thereafter the work of drilling the said two wells was proceeded with simultaneously;

That oil was produced in paying quantities in the said second well (being the third hole on which drilling was done) many months before oil was produced in paying quantities in the said first well; that the said Mays Oil Company let a contract with a drilling firm, whereby said drilling firm was to drill for the Mays Oil Company three wells; that the said drilling company began to sink the first of these additional wells on July 28, 1911, at a point on the south half of the northwest quarter of said Section 28 at the skeleton derrick that had already been erected thereon at the time of the first arrival of deponent on said section in 1909; that the said derrick was actually rigged up and used in the drilling of said well; [105]

That by that time, through the failures of its other customers, or by increasing its water supply, or both, the said Stratton Water Company was enabled to furnish water sufficient to drill two wells simultaneously, although the supply for the said purpose was not entirely sufficient to operate both sets of drilling tools with full satisfaction; that oil in paying quan-

tities was produced in said well No. Three in June, 1912; that the work of sinking the same was proceeded with diligently and without interruption from July, 1911, to the production of oil in paying quantities in June, 1912;

That deponent continued working upon the said properties for said Mays Oil Company and its successors until May, 1914; that during said period of time ten wells, producing oil in paying quantities, were sunk; that there never was a time during the whole period from the date of deponent's arrival in October, 1909, to the time that he ceased to be manager of said properties in May, 1914, when he did not have a string of from one to three sets of tools drilling upon said property;

That deponent was during all of said period of time personally interested in the shares of stock of the company which employed him, and that he had great personal inducement to proceed with the work of developing the said property as rapidly as the same could be done; that at no time was the company short of funds for the said purpose, and that at all times it had ample credit, and that with one concern alone it had a credit of \$100,000 at all times from 1909, to the time that deponent's employment upon said property ceased, and that said development of each of the said properties and each of the said governmental subdivisions thereof was proceeded with as [106] rapidly and diligently as was physically possible in view of the water difficulties encountered, and the nature and object of the enterprise; that since deponent's employment upon said property

ceased, he has, nevertheless, been financially interested therein, and has visited the said property nearly once a month since that time, to wit, since May 4, 1914; that he has observed the work that has been done upon the said property since May 4, 1914, and has noted that four wells have been sunk since that time and that the work of developing said property is diligently pursued by those now in charge;

That taxes were levied upon all of the said land, and were paid by deponent in behalf of his employers; that the aforesaid possession of said property was maintained in absolute good faith, and was accompanied during the time deponent was so employed by an expenditure of more than \$500,000.

This deponent has had a very wide experience in the drilling of oil wells and knows what is necessary and essential thereto. In addition to a derrick, and the necessary drilling tools, machinery and pipe, the three essentials to drilling a well are labor, power and water; that without either one of the three last-named requisites it would be as impossible to drill such a well as it would be to drill the same without tools or machinery. Labor is no more important than is water. Without a proper supply of water it is not possible to perform such work. In the case of Section 28 we could get all of the essentials for drilling, except an adequate supply of water as hereinabove fully appears.

CHARLES H. SHERMAN.

Subscribed and sworn to before me this 27th day of December, 1915.

ALICE SPENCER,
Notary Public in and for the City and County of
San Francisco, State of California. [107]

Affidavit of Louis Titus, December 28, 1915.

State of California,
City and County of San Francisco,—ss.

Louis Titus, being first duly sworn, deposes and says: That he is the President of North American Oil Consolidated, a corporation, and has been the President of said corporation from the time it was organized in December, 1909, down to the present time.

That North American Oil Consolidated succeeded to the property and interests of a corporation known as the "Hartford Oil Company," and that this affiant was the President of said Hartford Oil Company from the time of its incorporation in May, 1909, down to the date of the dissolution of said corporation sometime in 1910. That said Hartford Oil Company was operating upon Section 16, Township 32 South, Range 23 East, M. D. B. & M., Kern County, California, during the year 1909, and drilling wells thereon; and also on Section 22, same township and range, during the same period of time. That in January, 1910, said operations were taken over by said North American Oil Consolidated and have been conducted thereon ever since, down to the present time. That in February, 1910, said North American Oil Consolidated began operations on Sec-

tion 26, same township and range; and also upon Section 15, same township and range. That the operations on all the foregoing property included the drilling of a considerable number of wells. That the above sections of land, with the exception of Section 15, were patented sections, the land in Section 22 and Section 26 having been patented by the United States Government to the predecessors in interest of the corporation above mentioned, under placer mining locations.

That beginning in January, 1910, and continuing throughout the year 1910 and a part of 1911, said corporation was operating on Sections 27 and 28, same township and range. Said Sections [108] 27 and 28 were not patented claims, but were held under placer mining locations.

That from the beginning of the operations of said Hartford Oil Company the greatest difficulty was experienced by said company in procuring sufficient water with which to drill its wells. The only sources of water supply available in that portion of the field at that time was one water system owned by H. C. Stratton (which was afterwards turned over to the Stratton Water Company, a corporation); and a second water system belonging to a corporation called the "Chanslor-Canfield Midway Oil Company," which was in fact owned and operated by the Santa Fe Railroad Company. That this affiant personally made efforts in the beginning to secure water from said Chanslor-Canfield Midway Oil Company, but was positively refused, the officers of said company claiming that they had no water to sell, all the water

they had being required for their own purposes. That he did succeed in buying water from H. C. Stratton, and the first water was delivered to Hartford Oil Company by said Stratton in May, 1909, and thereafter more or less water was delivered by said Stratton Water Company to the corporation above mentioned for a period of several years. That said source of water supply was very inadequate and inefficient; that there was never more than sufficient water to drill one well at any one time, whereas said corporation very much desired to drill several wells at the same time. That many times operations had to be shut down because there was no water to operate even one string of tools. That these delays were expensive and costly because of the danger of losing the casing in the hole and because the labor had to be paid for whether the tools were being operated. [109] That this affiant expostulated with said Stratton and other managers of the said water company, many times over the inadequacy and inefficiency of the service, but said company was totally unable to supply any greater amount of water because their system was insufficient and had no greater capacity.

That thereupon, toward the end of 1909, this affiant despaired of getting water in sufficient quantities from the said Stratton Water Company and began negotiations again with the Chanslor-Canfield Midway Oil Company; and that he finally succeeded in purchasing some water from the said Chanslor-Canfield Midway Oil Company. That said company would make no promise that it would furnish any particular

amount of water, but that it would allow us to turn the water on when there was water in the pipes to be had. That this source of supply was also very inefficient and totally inadequate to meet the wants of said corporation, North American Oil Consolidated. Nevertheless, said corporation continued to buy water from both of said water companies during the early part of 1910. That early in 1910, despairing of getting sufficient water from these two water companies, or from any other source that was apparently available, this affiant caused to be constructed a side track along the railroad, running across a portion of the property of the North American Oil Consolidated on Section 15; and thereupon for a period of several months, beginning with September, 1910, water was shipped by trainload to said North American Oil Consolidated, from Bakersfield to said side track on Section 15, and from there was pumped to Section 22, Section 16 and Section 26. That said operation required the laying of long strings of pipe and the installing of expensive pumping machinery. That this method of procuring water proved to be so expensive that it was not practicable and was finally abandoned in April, 1911.

[110]

That Section 28 is in the same general locality as the sections heretofore mentioned as being operated by North American Oil Consolidated; that the said general conditions as to water existed on Section 28 as existed on the sections hereinbefore mentioned.

It is, of course, true that water could have

been hauled in wagons for many miles and across a country having no roads. It would have been a physical possibility to have drilled wells in this manner, but as a practical commercial proposition it was absolutely prohibitive and the cost would have been so colossal that no well could have been drilled with any profit, no matter how great the returns from such a well. The whole country in which Section 28 is located is an arid country, almost desert in character, with practically no vegetation; and no surface [111] water and no well water could be had except at extraordinarily great depth. During 1909, and until the latter part of 1910, it was not known, nor even supposed that any water could be procured from wells at any depth whatever. All of the surrounding drilling at that time had tended to prove that no water in any quantities could be obtained from such wells, and it was only after 1910 it was found that, by drilling very deep wells and installing expensive pumping machinery, water in commercial quantities could be lifted from some wells in that vicinity; all water from such wells being salty and totally unfit for domestic purposes, but could be used for the purpose of drilling wells.

That in drilling an oil well large quantities of water must be constantly used, and any stoppage in the water supply while a well is being drilled is almost sure to be disastrous, frequently resulting in freezing of the casing, thus making an additional expense of several thousand dollars; and, moreover, such lack of water very frequently results in absolutely ruining the well, necessitating an abandon-

ment of that particular well and beginning all over on a new well.

That during the early part of 1910, this affiant, seeing that there would be great difficulty in procuring any adequate water supply for drilling in said locality, together with certain of his associates, employed engineers and began plans for bringing in a source of water supply that would be adequate to meet the requirements (at least in some small degree), of said locality. That in pursuance of this employment, said engineers caused certain surveys to be made from Pine Canyon in the Santa Barbara range of mountains for a distance of over forty miles to said Midway field; and complete plans and specifications were made for the laying of a pipe-line for said distance. Bids were actually procured for the building of said pipe-line upon [112] said specifications, whereupon it was found that the cost of building said pipe-line would be prohibitive and would be much greater than any possible return from the same would warrant.

That this affiant and his associates spent altogether approximately Ten Thousand Dollars (\$10,000) in making said surveys and in endeavoring to find an adequate source of water supply. That this expense was incurred beginning in the very early part of 1910, down to the beginning of 1911. That at all the times mentioned in this affidavit this affiant was acquainted with the owners of Section 28 involved in this action. That he knew of the difficulties the owners of Section 28 were having in procuring water at all times beginning with

the middle of 1909, down to the end of 1910. That as a practical commercial proposition it was impossible to have procured water for *Section for* purposes of drilling at any earlier time than the same was actually procured. That he was thoroughly familiar with all possible sources of water supply during 1909 and 1910 for said locality; and that this affiant does not believe that by any degree of diligence, or any expenditure within the bounds of reason, any supply of water sufficient for drilling purposes would have been procured in any manner for Section 28 at any earlier period of time than the same was actually procured.

That this affiant is President of Consolidated Mutual Oil Company, a corporation; and said corporation, together with its predecessors in interest, has been in the actual and notorious possession of said Section 28, and working the same, to the knowledge of this affiant, for more than six years prior to the commencement of this action.

That the said Consolidated Mutual Oil Company acquired and entered into possession of said properties in the month of February, 1914, and from that time forward this deponent has [113] been the president of said corporation and has had the active management of its affairs;

That at the time that the Consolidated Mutual Oil Company took possession of said Section 28, as aforesaid, there were situate on the said section six completed wells in which oil had been discovered in paying quantities and there were two wells upon

which drilling had been started, and which had been partially drilled;

That since the said corporation acquired the said properties it has erected upon the said properties elaborate improvements and drilled three new wells, and has also proceeded with the drilling work that was in progress at the time that the said properties were acquired;

That the said corporation has during the said period laid out and expended in improvements upon said property, and in drilling wells and in exploration and development work, a sum in excess of \$150,000; and that the improvements now upon the said property are of a value in excess of \$150,000;

That the occupation of the said Section 28 by the said corporation, and its predecessors in interest, were and have been at all times open, notorious, and were at all times actually known to the Land Department of the United States Government, and that whatever activities in the way of development and improvement of the said property have taken place were with the full knowledge of the officers and agents of the Land Department of the United States. That during all of the said period of time the said corporation has given to the agents of the Land Department free access to its books and records of all kinds, and the said United States Government has at all times during the said period had actual reports and knowledge of the improvements that the said corporation was making upon said property, and has had access to the books and papers of said corporation [114] showing the amount of

oil that it had extracted and was extracting, and showing the contractual obligations which said corporation was under in the matter of its equipment and the disposition of its oil supply;

That during all of the said time the plaintiff through the officers and agents of its Land Department has had actual knowledge that the defendant, Consolidated Mutual Oil Company, was in possession of the said property under a claim of right, and it has during all of said period of time and until the filing of this suit stood by and knowingly permitted the said defendant corporation, without objection, to make the aforesaid expenditures of money and to extract oils from said properties and to incur obligations in and about the development of said property, and to develop the said property to its present condition and to extract therefrom the very oil the value of which it is here seeking to recover;

That deponent is informed and believes, and on such information and belief avers, that similarly with full knowledge of the facts concerning the location and possession and the work that had been done upon the said Section 28 on and prior to the 27th day of September, 1909, plaintiff stood by and knowingly permitted the predecessors in interest of the said Consolidated Mutual Oil Company to remain in undisputed possession of the said premises and to expend, in work and labor tending to the development of oil on said property, upwards of \$200,000. That the money so expended had been expended in large part in developing the identical wells upon the said property which were producing

oil at the time that the said Consolidated Mutual Oil Company purchased the said property, and that the purchase of the said property by the said corporation was largely induced by the said developments. That because of the said development the said corporation has paid to its predecessors in interest more than \$500,000. [115]

That deponent as resident of said corporation has made a rigid and careful study of the most economical methods of handling the business conducted by the said corporation;

That the said business is one which deals with large quantities of oil and with a very great number of items of expense, and that the difference of a very few mills or cents upon each item involved results in great aggregate loss or gain to the said corporation; that the business is one requiring for its successful conduct careful training and years of experience and calls for all of the energy and painstaking perseverance of self interest in order that such business shall be economically and advantageously administered; and in order that its wells may continue to produce. That without such an administration of said corporation's business great and irreparable loss will result to the said business and to the said corporation and its stockholders;

That men trained in the said business and who have the time at their command, and are in a situation to devote the necessary energy to conduct such a business, would be very difficult to find; that deponent in his own experience has found it impossible to himself select or procure thoroughly satis-

factory assistants in such work, regardless of the amount that he has been prepared to pay therefor. Deponent verily believes that it is most improbable that this court could find a person to act as receiver of said business who would administer the said business without serious and irreparable loss and detriment to the said corporation and its stockholders.

That in the judgment of this deponent a receiver cannot be appointed to take charge of and operate the said properties without irreparable loss and injury to the said corporation; [116]

That the said corporation is fully able to respond in damages for any detriment the plaintiff may suffer pending this litigation.

LOUIS TITUS.

Subscribed and sworn to before me this 28th day of December, 1915.

C. B. SESSIONS,

Notary Public in and for the City and County of San Francisco, State of California. [117]

Affidavit of E. W. Kay.

State of California,
City and County of
San Francisco,—ss.

E. W. Kay, being first duly sworn, deposes:

That he was during all of the time hereinafter mentioned Manager of the Stratton Water Company; that he is not a party to nor in anywise interested in the above-entitled action;

That from August, 1909, to July, 1910, the Strat-

ton Water Company was engaged in the business of producing and selling water in the North Midway Field; that during said time, it had three producing wells; that two of said wells were of little value, and all the water they would produce in 24 hours could be pumped out in an hour and a half; that during said period of time, Stratton Water Company at no time, operating its wells for full capacity during twenty-four hours, could produce in excess of 3,300 barrels of water;

That during said period of time the Stratton Water Company had applications from oil companies desiring water for 16,000 to 20,000 barrels a day; that Stratton Water Company actually entered into arrangements to supply from sixteen to twenty oil companies with water at from seven to nine cents a barrel; that the requirements of these companies were for not less than 7,500 barrels a day for current use, and it was necessary in the interests of due caution that each company should have from 700 to 1,000 barrels of water on hand to hold down heaving sands which would destroy the well; that in the endeavor to supply the requirements of its companies with which it had contracts, and which companies needed 7,500 barrels a day with the 3,300 barrels total output of the Stratton Water Company, it was the policy of the company to divide this water up as equally and equitably as possible.

[118]

That in pursuance of this policy, whenever one well got into serious trouble and was in urgent need of a large amount of water, it was customary to shut

off the water supply of the other companies and supply the necessities of the company that was in trouble;

That during said period of time, one of the companies which it supplied with water was the Mays Oil Company; that this company was supplied through a two-inch pipe-line which was built by the Mays Oil Company, and ran for a distance of about three and a half miles; that at no time could the Stratton Water Company, in view of its contracts, have furnished the Mays Oil Company with enough water to run more than one well; that it was the policy of the Stratton Water Company never to supply its customers with more than enough water to run one well; that the well of the Mays Oil Company was often shut down on account of lack of water, and that said company lost a string of casing and finally lost the well, and had to start a new one by reason of failure of water supply;

That during this period of time, there was no other water supply in the Midway Field, except the water that was brought in by the Chanslor-Canfield Midway Oil Company; that the Chanslor-Canfield Midway Oil Company had only enough water for its own use and a few immediate favored neighbors;

That the Stratton Water Company, during this period of time, attempted to increase their supply of water without any material result;

That representatives of the Mays Oil Company, during this period, visited affiant from two to eight times a day, urging affiant to maintain a steady supply of water at the drilling well, and to give them

water for the other wells; that from the location of the water company's property, it was possible for [119] affiant to see the other wells, and that on many occasions when water was shut off from the well for the purpose of aiding some other property that was in difficulties, affiant could see the superintendent of the shut-down property getting into his conveyance to visit affiant and that thereupon affiant would turn the water into the line of that property, and thus satisfy the superintendent when he arrived, and as soon as the superintendent left, he would shut off the water again, so that by the time the superintendent returned to his property they would be without water;

That affiant does not now recall whether the operators of Section 2, Township 32 South, Range 23 East, M. D. M. & M., applied to the Stratton Water Company for water, but had they applied, it would not have been provided, as there was not sufficient water to fill their engagements that had already been made; that it was practically impossible to haul water in wagons to the Mays Oil Company on account of the bad grade which would have tilted the water out of the wagons;

Affiant further states that when he first started operations in the Midway Field, it took three and a half days to make twelve and a half miles with teams loaded with lumber; that in hauling water, it cost fifty-five cents a barrel to haul the water, and the mules would drink half the water that was being hauled while they were getting it there.

E. W. KAY.

Subscribed and sworn to before me this 17th day of December, 1915.

FLORA HILL,
Notary Public in and for the City and County of
San Francisco, State of California. [120]

Affidavit of Louis Titus, December 21, 1915.

State of California,
City and County of San Francisco,—ss.

Louis Titus, being first duly sworn, deposes and says:

That he is the president of the Consolidated Mutual Oil Company; that prior to the commencement of the above-entitled action, an application for patent was made to the Government of the United States for the quarter section of land involved in said suit, and applicant made a final entry thereon and paid to the Government of the United States the sum of \$2.50 per acre therefor, for which a receipt was issued, and is still uncanceled, and that said application for patent is still pending;

That the Consolidated Mutual Oil Company in good faith and for a valuable consideration, and believing that their predecessors in interest were diligently at work at the time of the withdrawal of September 27, 1909, and that they diligently continued at work until a discovery of oil was made, and believing that the location and title to said land was in all respects valid and having no notice or knowledge of any kind or character that there were any defects in said title, purchased a portion of said land, together with other land, and paid therefor a sum exceeding \$100,000 and since said time has expended

thereon a sum exceeding \$5,000 in improving said land;

Affiant is informed and believes, and on that ground alleges, that the agents of the plaintiff have had said land under investigation, and in 1910 plaintiff had full knowledge of all matters alleged in the Bill of Complaint, but that no notice was given or claim made by the Government of the United States that said claim was not a valid claim.

LOUIS TITUS.

Subscribed and sworn to before me this 21st day of December, 1915.

JAMES L. ACH,
Notary Public in and for the City and County of
San Francisco, State of California. [121]

Affidavit of Colin C. Rae.

State of California,
County of Los Angeles,—ss.

Colin C. Rae, being first duly sworn, deposes and says:

That he is now, and at all times herein mentioned was, a citizen of the United States, over the age of twenty-one years; that his postoffice address is 1003 Higgins Building, in the city of Los Angeles, county and State aforesaid;

That he has investigated the conditions existing in the Midway Oil Fields, so called, in Kern County, from September 1, 1909, to and including July 2d, 1910, with reference to facilities for the drilling of oil wells, and affiant states that from his examination of the conditions existing at said time develop-

ment was retarded and rendered costly and uncertain by lack of a proper water supply;

That on September 27th, 1909, the only companies selling water in the Midway Oil Fields were the Chanslor-Canfield Midway Oil Company and the Stratton Water Company;

That in 1905 the Chanslor-Canfield Midway Oil Company installed a 3-inch water-line from some water wells on Section 23-30-21, which is in the Santa Maria Valley, about 3 miles west of McKittrick, and ran the line along the foothills to Section 17-31-22, and then to what is known as the 25 Hill District in the Midway field. The wells were shallow, being only 70 or 80 feet deep and were dug in the earth;

That the Chanslor-Canfield Midway Oil Company, in addition to supplying water for its own development, sold water to various consumers whose land was contiguous to said water pipe-line.

That the quantity of water called for was greater than the supply, and therefore, in the latter part of 1908 the Chanslor-Canfield [122] Company commenced the installation of a 6-inch pipe-line to take the place of the old 3-inch line. This line was finished in 1909, and was about 25 miles in length.

When the line was completed it was found that the water wells would not produce sufficient water to supply the demand, and consequently the wells were deepened, but with no better results.

That in April, 1909, the drilling of new wells was commenced and work continuously carried on until October, 1909, during which time 8 wells were com-

pleted, and with more or less success as to production of water;

That when said wells were completed it was found that the pump used to force the water through the 6-inch water line was inadequate and a snow pump was ordered in the East. This pump was put in operation in the latter part of August, 1909, but proved to be too small, and another *until was* ordered, but was not put in operation until about October, 1910, and until the new unit was installed the capacity of the line was not materially greater than the old 3-inch line which had been in use prior to building the new 6-inch line.

That in addition to the new water wells, pumps and lines, it was necessary to install several 2,000 barrel tanks, which was done at various points in the field, as well as 3 100 h. p. boilers and several Luitweiler pumps, and that the cost of said water system was in the neighborhood of \$200,000.

That the number of consumers served by said Chanslor-Canfield Midway Oil Company was at no time in excess of 30, and during the period from September, 1909, to July 2, 1910, there was constant trouble, and at many times an insufficient quantity of water for development purposes. [123]

That by reason of the insufficiency and uncertainty of the water supply, the development of oil wells was retarded.

That the Chanslor-Canfield Midway Oil Company distinctly stipulated with its consumers as to said uncertainty and assumed no liability in any way;

That at all times during said period there was a far greater demand for water than the Chanslor-Canfield Midway Oil Company could supply, and that said company actually had, at all times herein mentioned, a waiting list of individuals and companies who desired water for development purposes;

That the Stratton Water Company secured water from a well originally sunk for oil, in the northeast corner of Section 7, Township 32 South, Range 27 East.

That a 3-inch pipe-line, five miles in length from said well was run in a general southeasterly direction along the foothills to what is known as the 25 Hill District, in the Midway Field.

That the water sold by this company was not, as a matter of fact, fit for use in boilers.

That said company could not supply the demand made upon it for water.

That the supply was uncertain and that development was actually stopped on several sections or portions thereof because of failure of water supply.

That by reason of the inability to obtain water in the Midway Field some of the larger companies put in private water systems at a large expenditure of money.

That in 1908 the Standard Oil Company investigated the various sources of water supply in the Midway Field, but could not obtain water for the operation of its pump station for development purposes.
[124]

That said Standard Oil Company in 1908 entered

into a contract for the sinking of a water well on Section 1, Township 32 South, Range 23 East, M. D. B. & M.;

That a well was sunk, but said company was not successful in developing a water supply from said well.

That said company being unable to secure water for the operation of its oil pip-line and for the development of its properties, developed a water supply at Rio Bravo, a distance of 23 miles from Taft, Kern County, California, and brought water into the Midway Field through the said oil pipe-line;

That oil was pumped a few days to Rio Bravo, the line cleared and water pumped back from Rio Bravo to tanks in the Midway Field.

That this water was the only water used by Standard Oil Company for development work in Midway Fields; that this mode of supplying water was used by said company until 1910, when a separate water-pipe line was constructed from Rio Bravo to the Midway Field;

That said company did not supply water to any other person or company, and based its refusal so to do on the ground that it did not have water enough for its own development and use.

That in order to carry on development work in the early part of 1909 the Honolulu Oil Company by reason of said universal scarcity of water, investigated possible sources of supply, and drilled a well for the purpose of securing a water supply near Buena Vista Lake.

That said company was not successful in securing suitable water for its said needs, and entered into negotiations with the Buena Vista Reservoir Association, and through a private arrangement secured water from said Buena Vista Lake, which was conveyed by means of a water-pipe line to the properties of the said Honolulu Oil Company in the Midway Field. [125]

That said water-pipe line system was constructed at a cost of many thousands of dollars, and the Honolulu Oil Company did not furnish any person or company with water, giving as a reason the fact that the said water-pipe line would not supply any more than enough water for the use of said company.

That by reason of the inability of operators to secure water for development purposes and their great need therefor, a co-operative organization, known as the Kern Midway Water Company, was organized, and brought water in to said Midway Field in tank cars;

That at no time was the amount of water secured in this manner sufficient for the needs of the said organization.

That cars for said purpose were secured with great difficulty and that said supply was unreliable.

COLIN C. RAE.

Subscribed and sworn to before me this 16th day of December, 1915.

BERTHA L. MARTIN,
Notary Public in and for the County of Los Angeles,
State of California. [126]

Affidavit of C. H. Sherman, December 13, 1915.

State of California,

City and County of San Francisco,—ss.

C. H. Sherman, being first duly sworn, deposes:

That he is and was at all times herein mentioned over the age of twenty-one years;

That in the early part of October, 1909, he entered the employ of the Mays Oil Company as manager, and was on and about Section 28, Township 31 South, Range 23 East, M. D. B. & M. at all times from thence forward, and up to the month of May, 1914;

That the predecessors in interest of said Mays Oil Company entered into the possession of the Northwest Quarter of said Section 28, Township 31 South, Range 23 East, M. D. B. & M., under a mineral location made as provided by law prior to September 27, 1909;

That prior to said date, the derrick was erected on said quarter section for the purpose of drilling for oil, and the work of development on the well was actually commenced prior to September 27, 1909, and thereafter the work tending to discovery of oil was continued diligently by occupants in good faith until oil was discovered in July, 1912, as hereinafter more particularly set out;

That many difficulties were encountered in the actual drilling of said well which the occupants sought diligently and continuously to overcome, but in spite of the continued diligence of the operators delayed the completion of the work; that the difficul-

ties referred to arose chiefly in the getting of casing and other materials necessary in drilling a well, and in the shortage of water; that the period from September, 1909, to August, 1910, was a period of great development in the Midway Field, and at the time of the inception of the said work, practically no water was available; [127]

That concurrently with the inception of work on said Northwest Quarter, the occupants were also working on the Northeast Quarter and on the Southwest Quarter of the Section; that the only source of water which was available to the occupants of said land was the water furnished by the Stratton Water Company, whose wells were situated on Section 7, Township 32 South, Range 23 East, M. D. B. & M., and in order to get such water, it had been necessary for the Mays Oil Company to run a water-line about five miles in length to the source of the water supply; that the line was two inches in diameter and the total amount of water which could be obtained from the Stratton Water Company was at no time *time* sufficient to drill more than one well, and that on many occasions the available supply of water was not even sufficient for that purpose, to such an extent that, during the month of August, 1909, the well on the Southwest Quarter was shut down for sixteen days by reason of the inability to get sufficient water to carry on the operations;

That a large and continuous supply of water is absolutely essential for the drilling of oil wells in the Midway Field, and the failure of the supply of

water inevitably results in the sticking of the casing, and thereby in the loss of a string of casing which costs the Company anywhere from \$3,000 to \$6,500, depending on the depth at which it is lost;

That in said well on the Southwest Quarter, by reason of the uncertainty of said water supply, a string of casing was lost, and finally resulted in the entire loss of the hole and necessitated moving the derrick and commencing a new well;

That it is absolutely impossible to start drilling of a well unless a sufficient and continuous supply of water is assured; that during all periods, constant and persistent efforts were made by the Mays Oil Company to secure an adequate supply of [128] water, and as soon as an adequate supply of water was available the drilling of the wells was pursued continuously and with the greatest diligence;

That during said period of time, affiant was handicapped in his operations by constant failing of the water supply, and called at the headquarters of the Stratton Water Company three or four times every day, and often during the early hours of the morning in the persistent endeavor to urge said Stratton Water Company to supply the property with sufficient water, but notwithstanding such efforts, it was never possible to drill more than one well on account of the inability of the Stratton Water Company to furnish water;

That during the period up to January 1st, 1910, there was expended in the development of the said land a sum of money exceeding \$5,300, and that

during the year 1910, there was expended in developing the land a sum of money exceeding \$14,500, and thereafter until oil was discovered, a further sum was expended on said land exceeding \$48,000, that thereafter there was expended on said land in 1913, the sum of \$78,571.20;

That the Northeast Quarter, the Northwest Quarter and the Southwest Quarter of said Section were all located as placer mining claims, and constituted a group of claims lying contiguous and owned by the same persons, and that all labor done on one of said claims for the discovery of oil tended to the development to determine the oil-bearing character of the contiguous claims; that the wells on said claims were all grouped about the point of contact of said three claims, that is, near the center point of said Section 28; [129]

That during all of the periods herein mentioned, the actual work of drilling a well was continuously and diligently carried on on the Southwest Quarter; that on said three claims, up to December 31, 1909, there was work done tending to the discovery of oil in all costing in excess of \$43,000; that during the year 1910, there was expended on said three claims, tending to the discovery of oil, a sum exceeding \$59,000; that during the year 1911, there was expended on said three claims a sum exceeding \$90,900;

That the Consolidated Mutual Company, by itself, its grantors and those claiming under it, have been in the open, notorious, adverse, and exclusive possession of said Northwest Quarter of said Section for

more than five years preceding the commencement of the above-entitled action, and that they were diligently at work in good faith drilling a well for oil on said land between June 26, 1910, and July 2d, 1910 and thereafter diligently continued such work until discovery of oil was made.

C. H. SHERMAN.

Subscribed and sworn to before me this 13th day of December, 1915.

[Seal]

ANNE F. HASTY,

Notary Public in and for the City and County of
San Francisco, State of California. [130]

**Order Permitting Withdrawal of Affidavit of C. H.
Sherman.**

It appearing to the Court that two affidavits of C. H. Sherman have been filed upon motion for the appointment of a receiver in the above-entitled action, one dated the 13th day of December, 1915, and the other the 27th day of December, 1915.

And it further appearing that the first of said affidavits was prepared in the office of A. L. Weil, Esq., attorney for defendant Consolidated Mutual Oil Company and that a copy thereof was thereafter submitted to Charles S. Wheeler, Esq., of counsel for said defendant, in order that he should pass upon the same before the same was to be filed; and it appearing that the said Charles S. Wheeler, Esq., in connection with the said Sherman investigated drilling records of the said Mays Oil Company, and said C. H. Sherman thereupon discovered that he had erred in stating that drilling of a well on the North-

east Quarter had started in 1910, and that the correct date should be 1911.

And it appearing that the second affidavit was prepared in the office of the said Charles S. Wheeler, Esq., and that in said affidavit said date was corrected and that it was intended to file said second affidavit and not to file the said first affidavit, but that said first affidavit was inadvertently sent to Los Angeles for filing from the office of said A. L. Weil, Esq.; and counsel having made the foregoing representations to the Court and having asked the Court for an order permitting them to withdraw the said first affidavit of the said Sherman and it appearing to the Court that it is proper that the said first affidavit should under the circumstances be withdrawn.

NOW, THEREFORE, IT IS ORDERED that the said first affidavit of said C. H. Sherman may be withdrawn and the same hereby is stricken from the record.

Dated January 18th, 1916.

M. T. DOOLING,
Judge. [131]

Affidavit of C. R. Stevens.

State of California,
County of Los Angeles,—ss.

C. R. Stevens, being first duly sworn, deposes and says:

That he is a citizen of the United States, over the age of twenty-one years; that his postoffice address is 1003 Higgins Building, in the City of Los Angeles, county and state aforesaid;

That from September 1st, 1909, to March 1st, 1910, the oil well supplies sold by the supply houses in Taft, Kern County, California, had increased from approximately \$125,000 during the month of September, to approximately \$600,000 during February, 1910; that thereafter and up to September 1st, 1910, the approximate sales of oil well supplies by the combined supply houses at Taft exceeded \$750,000 per month; that these figures do not include the purchase of lumber in immense quantities for rigs and other building purposes, nor do these figures include direct purchases by large operating companies such as the Standard Oil Company, Associated Oil Company, Union Oil Company, Kern Trading & Oil Company, and other companies purchasing material direct at other points for shipment into the Midway Field;

That the various supply houses, as well as other large companies purchasing direct, experienced great difficulty in securing deliveries of oil well supplies from manufacturers in the East, particularly of casing and boilers, as said manufacturers had not anticipated the enormous increase in demand;

That because of the enormous increase in demand for oil well supplies, including lumber, during the period hereinbefore mentioned, the railroad companies were unable to expeditiously [132] handle freight, and as a result there was, particularly during the early part of 1910, congestion of cars at Bakersfield, the railroad companies being unable to clear through to Taft; that during the months of February and March, 1910, there were more than

two hundred (200) cars of material congested at Bakersfield awaiting clearance for Taft; that because of the activity in the Midway Field the office force of the Sunset Railway Company at Taft was increased, during the time above mentioned, from two to twenty-six men.

C. R. STEVENS.

Subscribed and sworn to before me, this 16th day of December, 1915.

BERTHA L. MARTIN,

Notary Public in and for the County of Los Angeles,
State of California. [133]

Order Approving Statement of Evidence.

It appearing to the Court that Notice of Lodgment of Statement of Evidence on Appeal in behalf of appellants Consolidated Mutual Oil Company and J. M. McLeod was given to the solicitors for the plaintiff above named on the 15th day of March, 1916.

And it further appearing that on the 20th day of March, 1916, said plaintiff served on the solicitors for said appellants a copy of its proposed amendments to said Statement of Evidence, wherein said plaintiff requested that there be included in said Statement of Evidence the affidavit of C. R. Stevens, dated the 16th day of December, 1915, and the affidavit of C. H. Sherman, dated the 13th day of December, 1915.

And it appearing that by order of this Court dated the 18th day of January, 1916, said affidavit of C. H. Sherman was withdrawn and stricken from the rec-

ord on motion made by counsel for said appellants in open court, but which said motion was made without notice to said plaintiff.

And it being the fact that the Court did not treat as in evidence or consider the said affidavit so stricken out, in making the interlocutory order appointing a receiver, but counsel for appellants consenting to the insertion of said affidavit so stricken, if accompanied by the foregoing recitals, and the plaintiff consenting;

NOW, THEREFORE, the said proposed amendments of plaintiff are allowed and said affidavits of C. R. Stevens and C. H. Sherman, together with the Order permitting withdrawal [134] of Affidavit of C. H. Sherman, shall be included in said Statement of Evidence; and the said statement as amended being found to be full, true, and correct, the same is hereby approved.

Dated March 29, 1916.

M. T. DOOLING,
Judge. [135]

[Endorsed]: Due service and receipt of a copy of the within Statement of Evidence and Amendments this 30th day of March, 1916, is hereby admitted.

A. E. CAMPBELL,
Attorney for Plff.

No. A-42—Equity. In the United States District Court for the Southern District of California. United States of America, Plaintiff, vs. Consolidated Mutual Oil Company et al., Defendants. Statement of Evidence to be Included in Transcript on Appeal. Lodged Mar. 16, 1916. Wm. M. Van Dyke, Clerk.

By R. S. Zimmerman, Deputy Clerk. U. T. Clotfelter, A. L. Weil, Charles S. Wheeler and John F. Bosie, Attorneys for Defendant Consolidated Mutual Oil Co., Union Trust Building, San Francisco. Filed Apr. 1, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [136]

*In the District Court of the United States, for
the Southern District of California, Northern
Division, Ninth Circuit.*

No. A-42—EQUITY.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CONSOLIDATED MUTUAL OIL COMPANY
et al.,

Defendants.

Stipulation on Severance.

WHEREAS, a judgment or order has been made and entered appointing a receiver in the above-entitled action; and,

WHEREAS, the defendants Consolidated Mutual Oil Company and J. M. McLeod, desire and intend to appeal therefrom; and,

WHEREAS, the defendants Standard Oil Company, General Petroleum Company, and Associated Oil Company, do not desire or intend to appeal from such order; and,

WHEREAS, under such circumstances it is proper that an order of severance be made permitting the said defendants Consolidated Mutual Oil Com-

pany and J. M. McLeod to prosecute their appeal without joining the other defendants;

NOW, THEREFORE, IT IS HEREBY STIPULATED, that such an order may be made; and it is further stipulated that notice to appear on the application for order allowing appeal be, and the same is, hereby waived.

A. L. WEIL,
U. T. CLOTFELTER, and
CHARLES S. WHEELER and
JOHN F. BOWIE,

Attorneys for Defendant Consolidated Mutual Oil Company.

OSCAR LAWLER, P. W.,
Attorney for Defendant J. M. McLeod. [137]
OSCAR SUTRO, PILLSBURY, MADISON
& SUTRO,

Attorneys for Defendant Standard Oil Company.

A. L. WEIL,
Attorneys for Defendant General Petroleum Company.

EDMUND TAUSZKY,
Attorney for Defendant Associated Oil Company.

Order for Severance.

Pursuant to the foregoing stipulation, IT IS HEREBY ORDERED that Consolidated Mutual Oil Company and J. M. McLeod, defendants above named, be allowed to prosecute their appeal without joining the other defendants.

Dated March 3, 1916.

M. T. DOOLING,
Judge.

[Endorsed]: Original. No. A-42. In the United States District Court for the Southern District of California. United States of America, Plaintiff, vs. Consolidated Mutual Oil Company et al., Defendants. Stipulation on Severance. Filed Mar. 4, 1916. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Charles S. Wheeler, Attorney for Defendant Consolidated Mutual Oil Co., Union Trust Building, San Francisco. [138]

In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit.

No. A-42—EQUITY.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CONSOLIDATED MUTUAL OIL COMPANY,
NORTH AMERICAN OIL CONSOLIDATED,
MAYS CONSOLIDATED OIL COMPANY, J. M. McLEOD, LOUIS
TITUS, STANDARD OIL COMPANY,
COLUMBUS MIDWAY OIL COMPANY,
GENERAL PETROLEUM COMPANY,
ASSOCIATED OIL COMPANY and CALI-
FORNIA NATURAL GAS COMPANY,
Defendants.

Petition for Appeal and Order Allowing Appeal.

To the Honorable Court Above Entitled:

Consolidated Mutual Oil Company, a corporation,
and J. M. McLeod, defendants in the above-entitled

action, considering themselves aggrieved by the order made in the above-entitled cause on the 3d day of February, 1916, by which said order a Receiver was appointed, said order being an interlocutory order appointing a receiver, hereby appeal from said decree or order to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, for the reasons specified in their Assignment of Errors filed herewith, and pray that their appeal may be allowed, and that a transcript of the record, proceedings and papers upon which such decree was made and entered as aforesaid, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California. [139]

And your petitioners further pray that the proper order touching the security to be required to perfect their appeal be made.

OSCAR LAWLER,

Solicitor for Defendant J. M. McLeod.

A. L. WEIL,

U. T. CLOTFELTER,

CHARLES S. WHEELER and

JOHN F. BOWIE,

Solicitors for Defendant Consolidated Mutual Oil Company.

Order Allowing Appeal.

The foregoing petition for appeal is hereby granted and allowed, and the bond on appeal to be given on behalf of the above-named appellants is hereby fixed at \$500, to be conditioned according to law.

Dated March 3, 1916.

M. T. DOOLING,
Judge.

Due service and receipt of a copy of the within Petition for Appeal, this 3d day of March, 1916, is hereby admitted.

E. J. JUSTICE,
ALBERT SCHOONOVER,
A. E. CAMPBELL,
FRANK HALL,

Attorneys for Plaintiff.

[Endorsed]: Original. No. A-42—Equity. In the United States District Court for the Southern District of California. United States of America, Plaintiff, vs. Consolidated Mutual Oil Company et al., Defendants. Petition for Appeal and Order Allowing Appeal. Filed Mar. 4, 1916. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. U. T. Clotfelter, A. L. Weil and Charles S. Wheeler, John F. Bowie, Attorneys for Defendant, Consolidated Mutual Oil Co., Union Trust Building, San Francisco. [140]

*In the District Court of the United States, for
the Southern District of California, Northern
Division, Ninth Circuit.*

No. A-42—EQUITY.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CONSOLIDATED MUTUAL OIL COMPANY,
NORTH AMERICAN OIL CONSOLI-
DATED, MAYS CONSOLIDATED OIL
COMPANY, J. M. McLEOD, LOUIS
TITUS, STANDARD OIL COMPANY,
COLUMBUS MIDWAY OIL COMPANY,
GENERAL PETROLEUM COMPANY,
ASSOCIATED OIL COMPANY and CALI-
FORNIA NATURAL GAS COMPANY.

Defendants.

Assignment of Errors.

Now comes Consolidated Mutual Oil Company and J. M. McLeod, two of the defendants above named, by their solicitors, A. L. Weil, U. T. Clotfelter, and Charles S. Wheeler and John F. Bowie, Esqs., and Oscar Lawler, Esq., and aver that the interlocutory decree entered in the above-entitled action on the 3d day of February, 1916, to wit, the interlocutory decree appointing a receiver, is erroneous and unjust to the said defendants and file with their petition for appeal from said decree the following Assignment of Errors, and specify that said decree is erro-

neous in each and every of the following particulars, viz.:

I. The District Court of the United States, for the Southern District of California, erred in appointing a receiver upon the pleadings, evidence and proofs before the Court.

II. The District Court of the United States, for the Southern District of California, erred in appointing a receiver in this action, for the reason that no right to the possession of the [141] real property involved is shown to be in plaintiff, and plaintiff did not show any probability that plaintiff was entitled to or would or could recover said real property or the possession thereof, and that the appointment of a receiver herein under the circumstances appearing is not in conformity with the rules and principles of equity.

III. The District Court of the United States, for the Southern District of California, erred in appointing a receiver, for the reason that the evidence before the Court shows the fact to be that the land in controversy was on the 27th day of September, 1909, covered by a placer mining location or claim, which location or claim belonged on said date to the defendant McLeod; that the said location or claim was on said 27th day of September, 1909, an existing valid location or claim within the meaning of the President's withdrawal order of said date; that on said 27th day of September, 1909, the said McLeod, by himself and his lessees, was in the actual, exclusive and peaceable possession of the whole of said location or claim, and by himself and his lessees was

on said day diligently engaged in the prosecution of work leading to a discovery of oil or gas on said location or claim; that said work was at all times thereafter duly and diligently prosecuted, and resulted in the discovery of both oil and gas on said claim or location, thereby perfecting the same as a mining claim; that said McLeod is the owner of said perfected location and that defendant Consolidated Mutual Oil Company was in possession of a part thereof under a valid lease from the said McLeod; that plaintiff is without any equitable right or title whatever to the said land, and the appointment of a receiver under the circumstances is not conformable to the practice and rules of equity. [142]

IV. The District Court of the United States, for the Southern District of California, erred in appointing a receiver, for the reason that the evidence before the Court makes it clear that on the 27th day of September, 1909, the defendant McLeod, by himself and his lessees, was the *bona fide* occupant and claimant of the land in controversy; that said land was and is oil or gas-bearing land; that the said McLeod, by himself and his lessees, was in diligent prosecution of work leading to discovery of oil or gas on said quarter section of land; that thereafter said McLeod, by himself and his lessees, continued in diligent prosecution of said work until gas and oil were discovered thereon, and that oil and gas were discovered thereon long prior to the commencement of this action, and that the said McLeod, by himself and his lessees, has ever since continued to be such occupant and claimant and has continued in diligent

prosecution of like work thereon; that the plaintiff has no equitable right or claim whatsoever in or to said property and that the appointment of a receiver under the circumstances is not in conformity with the rules and principles of equity.

V. The District Court of the United States for the Southern District of California, erred in treating the complaint as an affidavit and in considering the alleged facts therein set forth as evidence of a probable or any right in plaintiff, for the reason that said complaint was not so verified that the same could be used for such purpose, inasmuch as it appears that the affiant had no personal knowledge of any facts alleged, which facts, if true, would tend to destroy the validity of the titles, rights, interests or claims of these defendants in and to said land, but that such allegations are mere hearsay based upon the statements and examinations and affidavits of third persons.

WHEREFORE, Appellants pray that said interlocutory decree [143] be reversed, and that said District Court for the Southern District of California, Northern Division, be ordered to enter a de-

cree reversing the decision of the lower court in said action.

OSCAR LAWLER,
P. W.,

Solicitor for Defendant and Appellant, J. M. Mc-
Leod.

A. L. WEIL,

P. W.,

U. T. CLOTFELTER,

P. W.,

CHARLES S. WHEELER and

JOHN F. BOWIE.

Solicitors for Defendant and Appellant, Consolidated
Mutual Oil Company.

Due service and receipt of a copy of the within
Assignment of Errors, this 3d day of March, 1916, is
hereby admitted.

E. J. JUSTICE,

ALBERT SCHOONOVER,

A. E. CAMPBELL,

FRANK HALL,

Attorneys for Plaintiff.

[Endorsed]: Original. No. A-42—Equity. In
the United States District Court for the Southern
District of California. United States of America,
Plaintiff, vs. Consolidated Mutual Oil Company,
et al., Defendants. Assignment of Errors. Filed
Mar. 4, 1916. Wm. M. Van Dyke, Clerk. By R. S.
Zimmerman, Deputy Clerk. U. T. Clotfelter, A. L.
Weil and Charles S. Wheeler, John F. Bowie, At-
torneys for Defendant, Consolidated Mutual Oil Co.,
Union Trust Building, San Francisco. [144]

*In the District Court of the United States, for the
Southern District of California, Northern Di-
vision, Ninth Circuit.*

No. A-42—EQUITY.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CONSOLIDATED MUTUAL OIL COMPANY,
NORTH AMERICAN OIL CONSOLI-
DATED, MAYS CONSOLIDATED OIL
COMPANY, J. M. McLEOD, LOUIS TITUS,
STANDARD OIL COMPANY, COLUMBUS
MIDWAY OIL COMPANY, GENERAL
PETROLEUM COMPANY, ASSOCIATED
OIL COMPANY and CALIFORNIA NATU-
RAL GAS COMPANY,

Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That the undersigned, Massachusetts Bonding and
Insurance Company, as surety, is held and firmly
bound unto United States of America in the sum of
Five Hundred and no/100 (\$500) Dollars, lawful
money of the United States, to be paid to said United
States of America, to which payment, well and truly
to be made, we bind ourselves, and our successors, by
these presents.

Sealed with our seal and dated this 3d day of
March, 1916.

WHEREAS, the above-mentioned Consolidated Mutual Oil Company and J. M. McLeod have obtained an appeal to the Circuit Court of Appeals of the United States to correct or reverse the order or decree of the District Court of the United States, for the Southern District of California, Northern Division, in the above-entitled cause,

NOW, THEREFORE, the condition of this obligation is such that if the above-named Consolidated Mutual Oil Company and J. M. McLeod shall prosecute their said appeal to effect, and [145] answer all costs if they fails to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

MASSACHUSETTS BONDING AND INSURANCE COMPANY. [Seal]

By FRANK M. HALL,

By S. W. PALMER,

Attorneys in Fact.

The within bond is approved both as to sufficiency and form this 3 day of March, 1916.

M. T. DOOLING,

Judge.

[Endorsed]: No. A-42—Equity. In the United States District Court for the Southern District of California. United States of America, Plaintiff, vs. Consolidated Mutual Oil Company et al., Defendants. Bond on Appeal. Filed Mar. 4, 1916. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. U. T. Clotfelter, A. L. Weil and Charles S. Wheeler, Attorneys for Defendant, Cons. Mutual

Oil Co., Union Trust Building, San Francisco.
[146]

*In the District Court of the United States, for the
Southern District of California, Northern Di-
vision, Ninth Circuit.*

No. A-42.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CONSOLIDATED MUTUAL OIL COMPANY,
NORTH AMERICAN OIL CONSOLI-
DATED, MAYS CONSOLIDATED OIL
COMPANY, J. M. McLEOD, LOUIS TITUS,
STANDARD OIL COMPANY, GENERAL
PETROLEUM COMPANY, ASSOCIATED
OIL COMPANY and CALIFORNIA NATU-
RAL GAS COMPANY,

Defendants.

Praeceptum for Transcript on Appeal.

To the Clerk of the Above-entitled Court:

Please make up, print, and issue in the above-en-
titled cause a certified transcript of the record, upon
an appeal allowed in this cause, to the Circuit Court
of Appeals of the United States for the Ninth Cir-
cuit, sitting at San Francisco, California, the said
transcript to include the following:

Bill of Complaint;

Answer of Defendant Consolidated Mutual Oil Com-
pany;

152 *Consolidated Mutual Oil Company et al.*

Answer of Defendant J. M. McLeod;

Notice of Motion for Receiver and Restraining
Order;

Order Directing the Appointment of a Receiver; To-
gether with Opinions in Cases A-2 and A-38
Referred to therein;

Order Appointing Receiver;

Petition for Appeal; Order Allowing Appeal;

Assignment of Errors;

Bond on Appeal;

Citation; [147]

Stipulation on Severance;

Statement of Evidence on Appeal;

Notice of Lodgment of Statement of Evidence;

Praecipe for Transcript on Appeal.

You will please transmit to the Circuit Court of
Appeals for the Ninth Judicial Circuit, sitting at
San Francisco, California, the said record when pre-
pared, together with the original citation on appeal.

OSCAR LAWLER,

Solicitor for Defendant and Appellant, J. M. Mc-
Leod.

U. T. CLOTFELTER,

A. L. WEIL,

CHARLES S. WHEELER and

JOHN F. BOWIE,

Solicitors for Defendant and Appellant, Consolidated
Mutual Oil Company.

Due service and receipt of a copy of the within Praeceptum for Transcript this 15th day of March, 1916, is hereby admitted.

E. J. JUSTICE,
ALBERT SCHOONOVER,
A. E. CAMPBELL,
FRANK HALL,

Attorneys for Plaintiff.

[Endorsed]: No. A-42—Equity. In the United States District Court for the Southern District of California. United States of America, Plaintiff, vs. Consolidated Mutual Oil Company, et al., Defendants. Praeceptum for Transcript on Appeal. Filed Mar. 16, 1916. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. U. T. Clotfelter, A. L. Weil, Charles S. Wheeler, and John F. Bowie, Attorney for Defendant, Cons. Mutual Oil Co., Union Trust Building, San Francisco. [148]

*In the District Court of the United States, for the
Southern District of California, Northern Di-
vision, Ninth Circuit.*

No. A-42—IN EQUITY.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CONSOLIDATED MUTUAL OIL COMPANY,
NORTH AMERICAN OIL CONSOLI-
DATED, MAYS CONSOLIDATED OIL
COMPANY, J. M. McLEOD, LOUIS TITUS,

STANDARD OIL COMPANY, COLUMBUS
MIDWAY OIL COMPANY, GENERAL
PETROLEUM COMPANY, ASSOCIATED
OIL COMPANY and CALIFORNIA NATU-
RAL GAS COMPANY,

Defendants.

**Praecipe for Additional Portions of the Record to be
Incorporated into the Transcript on Appeal.**

To the Clerk of the Above-entitled Court:

Please incorporate into the transcript of the record upon the appeal allowed in this cause to the Circuit Court of Appeals of the United States for the Ninth Circuit, sitting at San Francisco, California, the following in addition to those portions of the record already requested by the Solicitors for the defendants and appellants, to wit:

The order allowing the plaintiff to submit its motion for receiver and restraining order upon the verified pleadings and affidavits.

You will please transmit to the Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, the portion of the record herein indicated, [149] at the same time and in the same manner as you transmit the portions of the record indicated by the praecipe heretofore filed by the Solicitors for the defendants and appellants.

Dated March 18, 1916.

E. J. JUSTICE,
ALBERT SCHOONOVER,
FRANK HALL,
A. E. CAMPBELL,

Solicitors for the United States of America, Plain-
tiff and Appellee.

Due service and receipt of a copy of the within Praeipe for Additional Portions of the Record to be Incorporated into the Transcript on Appeal, this 20th day of March, 1916, is hereby admitted.

U. T. CLOTFELTER,
A. L. WEIL,
CHARLES S. WHEELER and
JOHN F. BOWIE,
OSCAR LAWLER,

Solicitors for the Defendants and Appellants.

[Endorsed]: No. A-42. In the District Court of the United States for the Southern District of California. United States of America, Plaintiff, vs. Consolidated Mutual Oil Company, North American Oil Company, et al., Defendants. Praeipe for Additional Portions of the Record to be Incorporated into the Transcript on Appeal. Filed Mar. 22, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [150]

*In the District Court of the United States, in and for
the Southern District of California, Northern
Division.*

No. A-42—EQUITY.

THE UNITED STATES OF AMERICA,
Complainants,

vs.

CONSOLIDATED MUTUAL OIL COMPANY,
NORTH AMERICAN OIL CONSOLI-
DATED, MAYS CONSOLIDATED OIL

COMPANY, J. M. McLEOD, LOUIS TITUS,
STANDARD OIL COMPANY, COLUMBUS
MIDWAY OIL COMPANY, GENERAL
PETROLEUM COMPANY, ASSOCIATED
OIL COMPANY and CALIFORNIA NATU-
RAL GAS COMPANY,

Defendants.

**Certificate of Clerk, U. S. District Court to Tran-
script of Record.**

I, Wm. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing one hundred and fifty (150) type-written pages, numbered from 1 to 150, inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the Bill of Complaint, Answer of defendant Consolidated Mutual Oil Company, Notices of Motion for Receiver and Restraining Order, Order Submitting Motion on Affidavits, Order Submitting Motion on Verified Pleadings, etc., Order Directing Appointment of Receiver, Order Appointing Receiver, Notice of Lodgment of Statement of Evidence, Statement of Evidence on Appeal, Stipulation on Severance, Petition for Appeal and Order Allowing Appeal, Assignment of Errors, Bond on Appeal, Praecipe for Transcript of Record on Appeal and Praecipe for Additional Portions of Record to be Included in Transcript on Appeal, all in the above and therein-entitled [151] action, also of the Opinion of the Court in case A-2—Equity, referred to in the Order Directing Appointment of Re-

ceiver in this cause, and of the Opinion of the Court in case A-38—Equity, referred to in the Order Directing Appointment of receiver in this cause, and that the same together constitute the record on appeal herein as specified in the aforesaid Praeipice for Transcript on Appeal, filed in my office on behalf of the appellants, by their solicitors of record, and the aforesaid Praeipice for Additional Portions of Record to be included in the Transcript on Appeal, filed in my office on behalf of the appellees, by their solicitors of record. I do further certify that the cost of the foregoing transcript is \$80.60 the amount whereof has been paid me by the appellants herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand, and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Northern Division, this 28th day of April, in the year of our Lord one thousand nine hundred and sixteen, and of our Independence, the one hundred and fortieth.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California,

By Leslie S. Colyer,
Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled
4/28/16. L. S. C.] [152]

[Endorsed]: No. 2788. United States Circuit Court of Appeals for the Ninth Circuit. Consolidated Mutual Oil Company, a Corporation and J. M. McLeod, Appellants, vs. The United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed May 1, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*In the District Court of the United States, for the
Southern District of California, Northern Di-
vision.*

No. A-42—EQUITY.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CONSOLIDATED MUTUAL OIL COMPANY,
et al.,

Defendants.

**Stipulation and Order Enlarging Time to May 1,
1916, to File Transcript on Appeal.**

IT IS HEREBY STIPULATED that appellants herein may have to and include the first day of May, 1916, within which to prepare and file their Tran-

script on Appeal in the above-entitled proceeding.

Dated April 15th, 1916.

E. J. JUSTICE,
A. E. CAMPBELL,
FRANK HALL,
Solicitors for Plaintiff,

It is so ordered.

WM. W. MORROW,
United States Circuit Judge, Ninth Judicial Cir-
cuit.

[Endorsed]: No. A-42—Equity. In the United States District Court for the Southern District of California. United States of America, Plaintiff, vs. Consolidated Mutual Oil Co., et al., Defendants. Stipulation.

No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Stipulation and Order Under Rule 16 Enlarging Time to May 1, 1916, to File Record Thereof and to Docket Case. Filed Apr. 15, 1916. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals, Ninth
Judicial Circuit.*

CONSOLIDATED MUTUAL OIL COMPANY,
NORTH AMERICAN OIL CONSOLI-
DATED, MAYS CONSOLIDATED OIL
COMPANY, J. M. McLEOD, LOUIS TITUS,
STANDARD OIL COMPANY, GENERAL
PETROLEUM COMPANY, ASSOCIATED
OIL COMPANY and CALIFORNIA NATU-
RAL GAS COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

**Order Enlarging Time to June 1, 1916, to File
Transcript of Record on Appeal.**

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said appellant to docket said cause and file the record thereof, with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby enlarged and extended to and including the first day of June, 1916.

Dated at Los Angeles, California, March, 13, 1916.

M. T. DOOLING,

U. S. District Judge.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Consolidated Mutual Oil Company, et al., Appellants, vs.

United States of America, Appellees. Order Extending Time to File Record. Filed Mar. 20, 1916. F. D. Monckton, Clerk.

No. 2788. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to ——— to File Record Thereof and to Docket Case. Refiled May 1, 1916. F. D. Monckton Clerk.

No. 2789

See 2787 10
United States

Circuit Court of Appeals

For the Ninth Circuit.

NORTH AMERICAN OIL CONSOLIDATED, a
Corporation, WALTER P. FRICK, JOHN F.
CARLSTON, CLARENCE J. BERRY, DEN-
NIS SEARLES, WALTER H. LEIMERT
and WICKHAM HAVENS,

Appellants,

VS.

THE UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the
Southern District of California, Southern Division.

Filed

JUL 1 - 1916

F. D. Monckton,
Fisher Bros. Co. Print, 330 Jackson St., S. F., Cal.
Clerk

United States
Circuit Court of Appeals
For the Ninth Circuit.

NORTH AMERICAN OIL CONSOLIDATED, a
Corporation, WALTER P. FRICK, JOHN F.
CARLSTON, CLARENCE J. BERRY, DEN-
NIS SEARLES, WALTER H. LEIMERT
and WICKHAM HAVENS,

Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the
Southern District of California, Southern Division.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

For Appellants:

U. T. CLOTFELTER, Esq., 409 Kerckhoff Building, Los Angeles, California; and
A. L. WEIL, Esq., CHARLES S. WHEELER, Esq., and JOHN F. BOWIE, Esq., Union Trust Building, San Francisco, California;

For Appellees:

ALBERT SCHOONOVER, Esq., United States Attorney, Los Angeles, California;
E. J. JUSTICE, Esq., A. E. CAMPBELL, Esq., and FRANK HALL, Esq., Special Assistants to the United States Attorney General, 214 Postoffice Building, San Francisco, California. [4*]

*In the United States Circuit Court of Appeals for
the Ninth Judicial Circuit.*

No. A-48.

UNITED STATES OF AMERICA,
Plaintiff and Appellee,
vs.

NORTH AMERICAN OIL CONSOLIDATED,
PIONEER MIDWAY OIL COMPANY,
UNION OIL COMPANY OF CALIFORNIA,
PRODUCERS TRANSPORTATION COM-
PANY, WALTER P. FRICK, JOHN F.
CARLSTON, CLARENCE J. BERRY,
DENNIS SEARLES, WALTER H. LEI-
MERT and WICKHAM HAVENS,
Defendants and Appellants.

*Page-number appearing at foot of page of original certified Record.

Citation on Appeal.

United States of America,—ss.

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, Ninth Judicial Circuit, to be held at San Francisco, California, on the 1st day of April, 1916, being within thirty days from the date hereof, pursuant to an order allowing an appeal of record in the clerk's office of the District Court of the United States for the Southern District of California, in the suit numbered A-48—Equity in the records of said court, wherein the United States of America is plaintiff and appellee, and among others, North American Oil Consolidated, Walter P. Frick, John F. Carlston, Clarence J. Berry, Dennis Searles Walter H. Leimert and Wickham Havens are defendants and appellants, to show cause, if any there be, why the interlocutory decree directing the appointment of a receiver, rendered against the said North American Oil Consolidated, Walter P. Frick, John F. Carlston, Clarence J. Berry, Dennis Searles, Walter H. Leimert [5] and Wickham Havens should not be corrected, and why speedy justice should not be done in that behalf.

WITNESS, the Honorable M. T. DOOLING, United States District Judge, this 3d day of March, 1916.

M. T. DOOLING,
Judge. [6]

Due service and receipt of a copy of the within Citation on Appeal this 3 day of March, 1916, is hereby admitted.

,
E. J. JUSTICE,
Attorney for Plf.
J.W.W.

[Endorsed]: No. A-48. In the United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Plaintiff and Appellee, vs. North American Oil Consolidated, et al., Defendants and Appellants. Citation. Filed Mar. 4, 1916. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. [7]

In the District Court of the United States, in and for the Southern District of California, Northern Division.

IN EQUITY—No. A-48.

THE UNITED STATES OF AMERICA,
Complainants,

vs.

NORTH AMERICAN OIL CONSOLIDATED,
PIONEER MIDWAY OIL COMPANY,
UNION OIL COMPANY OF CALIFORNIA,
PRODUCERS TRANSPORTATION COMPANY,
WALTER P. FRICK, JOHN F. CARLSTON,
CLARENCE J. BERRY,
DENNIS SEARLES, WALTER H. LEIMERT and WICKHAM HAVENS,

Defendants. [8]

*In the District Court of the United States, for the
Southern District of California, Northern Division,
Ninth Circuit.*

IN EQUITY—No. A-48—Eq.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTH AMERICAN OIL CONSOLIDATED,
PIONEER MIDWAY OIL COMPANY,
UNION OIL COMPANY OF CALIFORNIA,
PRODUCERS TRANSPORTATION COM-
PANY, WALTER P. FRICK, JOHN F.
CARLSTON, CLARENCE J. BERRY,
DENNIS SEARLES, WALTER H. LEI-
MERT and WICKHAM HAVENS,

Defendants.

Bill of Complaint.

To the Judges of the District Court of the United
States for the Southern District of California,
Sitting Within and for the Northern Division of
Said District:

The United States of America, by Thomas W. Gregory, its Attorney General, presents this its Bill in Equity, against North American Oil Consolidated, Pioneer Midway Oil Company, Union Oil Company of California, Producers Transportation Company, Walter P. Frick, John F. Carlston, Clarence J. Berry, Dennis Searles, Walter H. Leimert and Wickham Havens (citizens and residents, respectively, as stated in the next succeeding paragraph

of this Bill), and for cause of complaint alleges:

I.

Each of the defendants, North American Oil Consolidated, Pioneer Midway Oil Company, Union Oil Company of [9] California and Producers Transportation Company, is, and at all the times hereinafter mentioned as to it was, a corporation, organized under the laws of the state of California. The Defendants, Walter P. Frick, John F. Carlston, *Daniel* Searles, Walter H. Leimert and Wickham Havens, are residents and citizens of the State and Northern District of California, and the defendant, Clarence J. Berry, is a citizen and resident of the State and Southern District of California.

II.

For a long time prior to and on the 27th day of September, 1909, and at all times since said date, the plaintiff has been and now is the owner and entitled to the possession of the following described petroleum, or mineral oil, and gas lands, to wit:

All of Section Two (2), Township Thirty-two (32) South of Range Twenty-three (23) East, Mount Diablo Base and Meridian, and of the oil, petroleum, gas, and all other minerals contained in said land.

III.

On the 27th day of September, 1909, the President of the United States, acting by and through the Secretary of the Interior, and under the authority legally invested in him so to do, duly and regularly withdrew and reserved all of the land hereinbefore particularly described (together with other lands)

from mineral exploration, and from all forms of location or settlement, selection, filing, entry, patent, occupation, or disposal, under the mineral and non-mineral land laws of the United States, and since said last-named date none of said lands have been [10] subject to exploration for mineral oil, petroleum, or gas, occupation or the institution of any right under the public land laws of the United States.

IV.

Notwithstanding the premises, and in violation of the proprietary and other rights of this plaintiff, and in violation of the laws of the United States and lawful orders and proclamations of the president of the United States, and particularly in violation of the said order of withdrawal of the 27th of September, 1909, the defendants herein, to wit; North American Oil Consolidated, Pioneer Midway Oil Company, Walter P. Frick, John F. Carlston, Clarence J. Berry, Dennis Searles, Walter H. Leimert and Wickham Havens, entered upon the said land hereinbefore particularly described, long subsequent to the 27th day of September, 1909, for the purpose of exploring said land for petroleum and gas.

V.

Said defendants, North American Oil Consolidated, Pioneer Midway Oil Company, Walter P. Frick, John F. Carlston, Clarence J. Berry, Dennis Searles, Walter H. Leimert and Wickham Havens, had not discovered petroleum, gas, or other minerals on said land on or before the 27th day of September, 1909, and had acquired no rights on, or with

respect to, said land, on or prior to said date.

VI.

Long after the said order of withdrawal of September 27, 1909, to wit, some time about the month of August, in the year 1910, as plaintiff is informed and believes, [11] there was first produced minerals, to wit, petroleum and gas, on or from said land and the defendants North American Oil Consolidated, Pioneer Midway Oil Company, Walter P. Frick, John F. Carlston, Clarence J. Berry, Dennis Searles, Walter H. Leimert and Wickham Havens, have produced and caused to be produced therefrom large quantities of petroleum and gas, but the exact amount so produced plaintiff is unable to state. Of the petroleum and gas so produced large quantities thereof have been sold and delivered by the said defendants, North American Oil Consolidated, Pioneer Midway Oil Company, Walter P. Frick, John F. Carlston, Clarence J. Berry, Dennis Searles, Walter H. Leimert and Wickham Havens, to the Producers Transportation Company and to the Union Oil Company of California, and the said defendants, North American Oil Consolidated, Pioneer Midway Oil Company, Walter P. Frick, John F. Carlston, Clarence J. Berry, Dennis Searles, Walter H. Leimert and Wickham Havens, have sold and disposed of oil and gas produced from said land to others to plaintiff unknown. Plaintiff does not know, and is therefore unable to state the amount of petroleum and gas which defendants, North American Oil Consolidated, Pioneer Midway Oil Company, Walter P. Frick, John F.

Carlston, Clarence J. Berry, Dennis Searles, Walter H. Leimert and Wickham Havens, have extracted from said land and sold, nor the amount extracted and now remaining undisposed of; nor the price received for such oil and gas as has been sold, and has no means of ascertaining the facts in the premises, except from said defendants, North American Oil Consolidated, Pioneer Midway Oil Company, Walter P. Frick, John F. Carlston, Clarence [12] J. Berry, Dennis Searles, Walter H. Leimert, Wickham Havens, Producers Transportation Company and Union Oil Company of California, and therefore a full discovery from said defendants is sought herein.

VII.

The defendants, North American Oil Consolidated, Pioneer Midway Oil Company, Walter P. Frick, John F. Carlston, Clarence J. Berry, Dennis Searles, Walter H. Leimert and Wickham Havens, are now extracting oil and gas from said land, drilling oil and gas wells, and otherwise trespassing upon said land and asserting claims thereto, and if they continue to produce oil and gas therefrom it will be taken and wrongfully sold and converted, and various other trespasses and waste will be committed upon said land to the irreparable injury of complainant, and will interfere with the policies of complainant with respect to the conservation, use and disposition of said land, and particularly the petroleum, oil and gas contained therein.

VIII.

Each of the defendants claims some right, title

or interest in said land, or some part thereof, or in the oil, petroleum, or gas extracted therefrom, or in or to the proceeds arising from the sale thereof, or through and by purchase thereof, and each of said claims is predicated upon or derived directly or mediately from some pretended notice or notices of mining locations, and by conveyances, contracts, or liens, directly or mediately, from said such pretended locators. But none of such location notices and claims are valid against complainant, and no rights have accrued to the defendants, or either [13] of them, thereunder, either directly or mediately; nor have any minerals been discovered or produced on said land except as hereinbefore stated; but said claims so asserted cast a cloud upon the title of the complainant, and wrongfully interfere with its operation and disposition of said land, to the great and irreparable injury of complainant; and the complainant is without redress or adequate remedy save by this suit, and this suit is necessary to avoid a multiplicity of actions.

IX.

Neither of the defendants, nor any person or corporation from whom they have derived any alleged interest was, at the date of said order of withdrawal of September 27, 1909, nor was any other person at such date a bona fide occupant or claimant of said land and in the diligent prosecution of work leading to the discovery of oil or gas.

X.

Except as in this bill stated, the plaintiff has no other knowledge or information concerning the

nature of any other claims asserted by the defendants herein, or any of them, and therefore leaves said defendants to set forth their respective claims of interest.

In that behalf the plaintiff alleges that, because of the premises of this bill, none of the defendants have or ever had any right, title or interest in or to, or lien upon said land, or any part thereof, or any right, title or interest in or to the petroleum, mineral oil, or gas deposited therein, or any right to extract the petroleum or mineral oil or gas from said land, or to convey or dispose of the petroleum and gas so extracted, or any part thereof; on the contrary, the acts of those [14] defendants who have entered upon said land and drilled oil wells, and used and appropriated the petroleum and gas deposited therein, and assumed to sell and convey any interest in or to any part of said land, were all in violation of the laws of the United States and the aforesaid order withdrawing and reserving said land, and all of said acts were and are in violation of the rights of the plaintiff, and such acts interfere with the execution by complainant of its public policies with respect to said land.

XI

The present value of said land hereinbefore described exceeds Three Hundred Thousand Dollars (\$300,000).

In consideration of the premises thus exhibited, and inasmuch as plaintiff is without full and adequate remedy in the premises, save in a court of equity where matters of this nature are properly

cognizable and relievable, plaintiff prays:

1. That said defendants, and each of them, may be required to make full, true and direct answer respectively to all and singular the matters and things hereinbefore stated and charged, and to fully disclose and state their claims to said land hereinbefore described, and to any and all parts thereof, as fully and particularly as if they had been particularly interrogated thereunto, but not under oath, answer under oath being hereby expressly waived;

2. That the said land may be declared by this Court to have been at all times from and after the 27th day of September, 1909, lawfully withdrawn from mineral [15] exploration and from all forms of location, settlement, selection, filing, entry or disposal under the mineral or nonmineral public land laws of the United States; and that the said location notices were fraudulently filed, and the said defendants did not acquire any right thereunder;

3. That said defendants, and each of them, may be adjudged and decreed to have no estate, right, title, interest or claim in or to said land, or any part thereof, or in or to any mineral or minerals or mineral deposits contained in or under said land, or any part thereof; and that all and singular of said land, together with all of the minerals and mineral deposits, including mineral-oil, petroleum and gas therein or thereunder contained, may be adjudged and decreed to be the perfect property of this plaintiff, free and clear of the claims of said defendants, and each and every one of them;

4. That each and all of the defendants herein,

their officers, agents, servants and attorneys, during the progress of this suit, and thereafter, finally and perpetually may be enjoined from asserting or claiming any right, title, interest, claim or lien in or to the said land, or any part thereof, or in or to any of the minerals, or mineral deposits therein or thereunder contained; and that each and all of the defendants herein, their officers, agents, servants and attorneys, during the progress of this suit, and thereafter, finally and perpetually may be enjoined from going upon any part or portion of said land, and from in any manner using any of said land and premises, and from in any manner extracting, [16] removing or using any of the minerals deposited in or under said land and premises, or any part or portion thereof, or any of the other natural products thereof, and from in any manner committing any trespass or waste upon any of said land or with reference to any of the minerals deposited therein or thereunder, or any of the other natural products thereof;

5. That an accounting may be had by said defendants, and each and every one of them, wherein said defendants, and each of them, shall make a full, complete, itemized and correct disclosure of the quantity of minerals (and particularly petroleum) removed or extracted, or received by them, or either of them, from said land, or any part thereof, and of any and all moneys or other property or thing of value received from the sale or disposition of any and all minerals extracted from said land, or any part thereof, and of all rents and profits re-

ceived under any sale, lease, transfer, conveyance, contract, or agreement, concerning said land, or any part thereof; and that the plaintiff may recover from said defendants, respectively, all damages sustained by the plaintiff in these premises;

6. That a receiver may be appointed by this Court to take possession of said land and of all wells, derricks, drills, pumps, storage vats, pipes, pipe-lines, shops, houses, machinery, tools and appliances of every character whatsoever thereon, belonging to or in the possession of said defendants, or any of them, which have been used or now are being used in the extraction, storage, transportation, refining, sale, manufacture, or [17] in any other manner in the production of petroleum or petroleum products or other minerals from said land, or any part thereof, for the purpose of continuing, and with full power and authority to continue the operations on said land in the production and sale of petroleum and other minerals when such course is necessary to protect the property of the complainant against injury and waste, and for the preservation, protection and use of the oil and gas in said land, and the wells, derricks, pumps, tanks, storage vats, pipes, pipe-lines, houses, shops, tools, machinery, and appliances being used by the defendants, their officers, agents or assigns, in the production, transportation, manufacture, or sale of petroleum or other minerals from said land, or any part thereof, and that such receiver may have the usual and general powers vested in receivers of courts of chancery.

7. That the plaintiff may have such other and

further relief as in equity may seem just and proper.

To the end therefore that this plaintiff may obtain the relief to which it is justly entitled in the premises, may it please Your Honors to grant unto the plaintiff a writ or writs of subpoena, issued by and under the seal of this Honorable Court directed to said defendants herein, to wit, North American Oil Consolidated, Pioneer Midway Oil Company, Union Oil Company of California, Producers Transportation Company, Walter P. Frick, John F. Carlston, Clarence J. Berry, Dennis Searles, Walter H. Leimert and Wickham Havens, therein and thereby commanding them, and each of them, at a certain time, and under a certain penalty therein to be named, to be and appear [18] before this Honorable Court, and then and there, severally, full, true and direct answers make to all and singular the premises, but not under oath, answer under oath being hereby expressly waived, and stand to perform and abide by such order, direction and decree as may be made against them, or any of them, in the premises, and as shall be meet and agreeable to equity.

THOMAS W. GREGORY,

Attorney General of the United States.

ALBERT SCHOONOVER,

United States District Attorney.

E. J. JUSTICE,

Special Assistant to the Attorney General.

A. E. CAMPBELL,

Special Assistant to the Attorney General.

FRANK HALL,

Special Assistant to the Attorney General.

United States of America,
Southern District of California,—ss.

J. D. Yelverton, being first duly sworn, deposes and says:

He is now and has been since the 1st day of March, 1913, Chief of Field Service of the General Land Office of the United States, and since the 1st day of July, 1915, has been also in direct charge of the San Francisco office of the Field Division of the General Land Office, and much of his official work has been done in the investigations of facts relating to the lands withdrawn by the president as oil lands, and especially the lands withdrawn by order of September 27, 1909, and by the order of July 2, 1910. That from examination of such lands, and the facts in relation thereto by special agents acting under his direction as such chief of Field Service, and from examination of the records of the General Land Office, and the local land offices of the complainant in said State of California, and particularly from the detailed reports of the Field Agents, and accompanying affidavits setting forth the facts, he is informed as to the matters and things stated in the foregoing complaint with reference to the particular lands therein described; and the matters therein stated are true, except as to such matters as are stated to be on information and belief, and as to these, affiant, after investigation, states he believes them to be true.

J. D. YELVERTON.

Subscribed and sworn to before me, this 5th day of November, 1915.

[Seal]

T. L. BALDWIN,
Deputy Clerk U. S. District Court, Northern Dis-
trict of California. [20]

[Endorsed]: Northern Division. No. A-48—Eq.
In the District Court of the United States for the
Southern District of California, Northern Division.
United States of America, Plaintiff, vs. North
American Oil Consolidated, et al., Defendants. Bill
of Complaint. Filed Nov. 6, 1915. Wm. M. Van
Dyke, Clerk. T. F. Green, Deputy. [21]

*In the District Court of the United States, for the
Southern District of California, Northern Divi-
sion, Ninth Circuit.*

IN EQUITY—No. A-48.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTH AMERICAN OIL CONSOLIDATED et
al.,

Defendants.

**Answer of North American Oil Consolidated, Walter
P. Frick, John F. Carlston, Dennis Searles, Wal-
ter H. Leimert, Wickham Havens, and Clarence
J. Berry.**

COMES NOW the North American Oil Consoli-
dated, Walter P. Frick, John F. Carlston, Dennis
Searles, Walter H. Leimert, Wickham Havens and

Clarence J. Berry, defendants named in the above entitled and numbered suit, and answer the bill of complaint on file therein as follows:

First Defense.

As and for their first defense to the cause of action set forth in said bill of complaint, said defendants move the Court for an order transferring said suit to the law side and calender of the above-entitled court for trial and final disposition. [22]

Said motion is made and based upon the ground that upon the allegations of the bill of complaint and from the prayer thereof it appears that said suit is one in ejectment brought by the plaintiff out of possession against the defendants in possession of the lands described in the bill of complaint and for damages for past trespasses both subjects of litigation over which a court of equity has no jurisdiction, said defendants have a right to trial by jury, and upon which the plaintiff has full, complete, speedy and adequate remedy in a court of law.

Said motion will be made and based upon the pleadings, records and files in the above-entitled and numbered suit.

Second Defense.

As and for their second defense to the cause of action set forth in the bill of complaint on file in the above entitled and numbered suit, this defendant moves the court for an order striking out of said complaint the portions thereof following:

1. That portion of paragraph VI, beginning with the words "Plaintiff does not know" and ending with the words "is sought herein."

2. All of paragraph VII.

3. That part of paragraph VIII which reads as follows: "And wrongfully interfered with its operation and disposition of said land to the great and irreparable injury of complainant; and the complainant is without redress or adequate remedy save by this suit, and this suit [23] is necessary to avoid a multiplicity of actions."

4. That part of paragraph X following: "And such acts interfere with the execution by complainant of its public policies with respect to said lands."

5. All of paragraph XI.

6. That portion of the bill of complaint following paragraph XI which reads: "And inasmuch as complainant is without full and adequate remedy in the premises, save in a court of equity where matters of this nature are properly cognizable and relievable."

7. All of paragraphs 4, 5 and 6 of the prayer of said bill of complaint.

Said motion will be made and based upon the ground that the portions of the bill of complaint above specified are and constitute scandalous and impertinent matter inserted in the bill of complaint and are redundant and surplusage.

Said motion will be made and based upon the pleadings, records and files in the above-entitled and numbered suit.

THIRD DEFENSE.

As and for their third defense to the cause of action set forth in the bill of complaint on file in the above-entitled and numbered suit, these defendants allege that the above-entitled court sitting as a

court of equity has no jurisdiction of the subject matter of said suit for that the allegations of the bill of complaint [24] show that the main case made thereby and the chief object and purpose of the suit is to try the question of title to the land as between the plaintiff out of possession and the defendant in possession of the land described in the bill of complaint; to secure possession thereof from the defendants; and a judgment for damages for alleged trespasses, all subjects without the jurisdiction of the court of equity and upon which plaintiff has full, adequate, speedy and complete remedy and relief in a court of law.

Fourth Defense.

As and for their fourth defense to the cause of action set forth in the bill of complaint on file in the above-entitled action, said defendants allege:

That on the 8th day of January, 1907, the land described in said bill of complaint was public mineral land of the United States open and subject to location and purchase under the laws of the United States relating to the sale and disposition of lands commonly known as placers, and on said date I. Strassburger, L. Strassburger, B. S. Lederman, G. S. Neustadter, E. L. S. Wrampelmeier, T. J. Wrampelmeier, L. A. Wrampelmeier and F. E. Wrampelmeier, each being then a citizen of the United States and all being theretofore associated together for the purpose of acquiring title to oil lands of the county of Kern, State of California, duly located said land under said laws by and through four placer locations as follows:

Lots 1 and 2 and the south half of the northwest

quarter of said section 2 as the Banter No. 1 Placer Mining Claim. [25]

Lots 1 and 2 and the south half of the northeast quarter of said section as the Banter No. 2 Placer Mining Claim;

The southeast quarter of said section as Banter No. 3 Placer Mining Claim; and

The southwest quarter of said section as Banta No. 4 Placer Mining Claim.

Notice of location of said placer mining claims were duly recorded in Book 66 of Mining Records, pages 59, 60 and 61, respectively, records of Kern County, California.

That thereafter and by mesne conveyances all of the right, title and interest of said locators in and to said land and the whole thereof became vested in defendants J. F. Carlston, Wickham Havens, Walter H. Leimert, Clarence J. Berry, and Walter P. Frick, and said defendants were at the time of the filing of said bill of complaint and now are and for a long time prior to said date had been the owners of said land and the whole thereof and they and their predecessors in interest have held and claimed said land ever since the location thereof as aforesaid, openly and notoriously and during said time the said land has been worked and developed for its minerals.

That on September 27, 1909, and for a long time prior thereto and ever since said time said defendants last above named were *bona fide* occupants and claimants of said land and the whole thereof in the diligent prosecution of work leading to a discovery

of oil or gas and that such work was and has been diligently continued.

That the North American Oil Consolidated, one of the defendants above named, has and claims an interest in said land, and the whole thereof, under and by virtue [26] of contract of sale between it and said persons last above named, defendants herein, which said contract was made, executed and delivered on July 14, 1913.

Fifth Defense.

As and for a fifth defense to the bill of complaint on file in the above-entitled action, these defendants allege:

That in the development of the land described in said bill of complaint there has been expended many thousands of dollars by these defendants and their predecessors in interest, and the said development work has extended over and been carried on diligently during a period of more than five years last past, all in strict conformity with the rules, regulations, customs and interpretations of the mining laws of the United States that have been in existence and acquiesced in by the plaintiff herein and its Congress and the Department of the Interior and for more than forty years prior to the filing of the bill of complaint herein; that said work of development was also in conformity with a policy of the plaintiff that had been well settled and acted upon for a like period of time; that the large amount of time and money aforesaid was expended in good faith and for the purpose of honestly acquiring title to the land stated and also upon the faith of said long existent rules,

customs, regulations and policies and upon the belief that plaintiff would not suddenly, as it now has, by the filing of this suit, reverse the same, to the irreparable injury of these defendants.

That the doing of said work of development and the expenditure of time and money in connection therewith [27] was at all the times with the full knowledge of this plaintiff by and through examinations of said land and of the things being done thereon made at various times by the agents of the Department of the Interior and reports thereof by said agents to said department, but notwithstanding such knowledge, this plaintiff made no objection whatever at any time prior to the filing of said bill of complaint to the claim of title to said land by said defendants, J. F. Carlston, Wickham Havens, Walter H. Leimert, Walter P. Frick and Clarence J. Berry and those claiming by, through or under them, or to the possession, occupation and working thereof by said persons or any of them, or of their predecessors in interest, until the filing of said bill of complaint, and on account of such failure on the part of this plaintiff to make objections as aforesaid these defendants and their predecessors in interest were warranted in believing and did believe that the plaintiff did not and would not object to the use and occupation of said land or the claim of title thereto aforesaid, or the extraction and use of minerals therefrom and said expenditures of money and time were made in full reliance upon such belief.

That by reason of the matters and things in this defense alleged, these defendants, allege, assert and

insist that the plaintiff is estopped from now claiming that it is entitled to the possession of said land or any part thereof, or of the mineral therein, or which has been produced therefrom or any part thereof, and that said plaintiff is guilty of laches in the institution of this suit and in objection to the rights and title of these defendants and ought not now in all equity and good conscience to be heard to assert any claim or right to [28] dispossess these defendants or any of them or to assert any claim or right of title to any part of the mineral therein or heretofore extracted therefrom.

Sixth Defense.

Without waiving, but on the contrary expressly reserving the full benefit of each of the defenses hereinbefore set forth, these defendants as and for their sixth defense to the cause of action set forth in the bill of complaint on file in the above-entitled suit, admit, deny and allege as follows:

I.

Admit the allegations of paragraph I of said bill of complaint.

II.

Deny that the plaintiff at any of the times mentioned in paragraph II of said bill of complaint has been or now is the owner or entitled to the possession of the land described in said paragraph II or of any part thereof, or of the oil, petroleum, gas or any other mineral contained in said land, except subject to the right, title and interest therein of these defendants.

On the contrary these defendants allege that at

the time of the filing of said bill of complaint and for a long time prior thereto these defendants were in the possession of said land and rightfully entitled to hold possession thereof and to extract and dispose of the minerals therein contained for their use and benefit by virtue of compliance and in good faith by their predecessors in interest and these defendants with the laws of the United States relating to the sale and disposition [29] of its mineral lands and also by virtue of the act of Congress of June 25, 1910 (36 Stats. at L. 847).

III.

Admits that on September 27, 1909, the President of the United States, acting by and through the Secretary of the Interior, issued an order temporarily withdrawing from location, selection, settlement, filing, entry, patent or occupation under the mineral or nonmineral public land laws the land, among others, described in paragraph II of said bill of complaint, but denies that said order withdrew said land or any part thereof from mineral occupation, or exploration; denies that since September 27, 1909, none of said lands have been subject to exploration for mineral, oil, petroleum or gas, or to occupation or to the institution of any right thereto under the public land laws of the United States.

On the contrary these defendants allege that as to the lands described in paragraph II of said bill of complaint, these defendants were at the time of the filing of said bill of complaint and for a long time prior thereto authorized by the provisions of said act of Congress approved June 25, 1910, to continue

in the occupation of said land and in its exploration and development for petroleum or gas or any other minerals therein contained for that by the terms of said Act of Congress whatever force or effect said order of withdrawal of September 27, 1909, had as to said land described in said paragraph II was vacated and made null and void.

IV.

Deny that these defendants or either of them [30] entered upon the land referred to in paragraph IV of said bill of complaint long or at any other time subsequent to September 27, 1909, for the purpose of exploring said land for petroleum or gas.

On the contrary these defendants allege that they and their predecessors in interest entered upon said land for said purpose long prior to September 27, 1909, and on said date these defendants were *bona fide* occupants and claimants of said land in the diligent prosecution of work leading to a discovery of oil or gas and thereafter continued in diligent prosecution of said work until the discovery on said land of petroleum therein.

Denies that any entry upon said land by these defendants or either of them was in violation of any proprietary or other right of the plaintiff or in violation of the laws of the United States or the lawful orders or proclamations of the President of the United States or in violation of said order of withdrawal of September 27, 1909.

V.

Deny that a discovery of petroleum, gas or other mineral was not made upon said land described in

paragraph II of said bill of complaint on or before September 27, 1909, and deny that these defendants or their predecessors in interest had acquired no rights on or with respect to said land on or prior to said date.

VI.

Deny that mineral was first produced upon said land some time about the month of August in the year 1910, or long after the said order of withdrawal of September 27, 1909. [31]

Admit that these defendants have produced petroleum from said land and have sold and disposed of the same but at this time are unable to state precisely the total amount thereof and what part of such amount has been sold to the various purchasers thereof.

Allege that these defendants are willing to make a complete statement thereof but are unable to do so at the time of the preparation and filing of this answer.

VII.

Admit that the defendant, North American Oil Consolidated, is now extracting oil from said land and drilling oil or gas wells thereon, but deny that the doing of these things is a trespass upon said land or that they are in any wise trespassing thereon; or that oil or mineral will be taken by said defendants or either of these defendants from said land and wrongfully sold or converted; deny that various or any trespass or waste will be committed upon said land if these defendants or either of them continue to procure oil or gas therefrom or that such acts will

be to the irreparable or other injury of the complainant.

Deny that anything being done upon said land by these defendants or either of them will in any way interfere with the policies of the complainant mentioned in paragraph VII of said bill of complaint.

VIII.

Admit that these defendants claim a right, title and interest in the land described in paragraph II of said bill of complaint and the whole thereof and in and to the oil, petroleum and gas therein and in [32] that heretofore extracted therefrom and in and to the proceeds arising from the sale thereof.

Admit that said claims of these defendants are predicated upon and derived from notices of location of mining claims and by conveyance from the locators thereof to these defendants but deny that said notices of location or said mining claims are pretended notices or mining claims or that the locators of said mining claims were pretended locators.

Deny that said location notices and mining claims or either of them are invalid against this plaintiff and deny that no rights have accrued to these defendants or either of them thereunder directly or mediately; deny that any minerals have been discovered or produced on said land except as in said bill of complaint stated; deny that said claims of these defendants cast a cloud upon the title of complainant or wrongfully interfere with its operation or disposition of said land to its great or other or irreparable or any injury; deny that complainant is without redress or adequate remedy save by this suit

or that this suit is necessary to avoid a multiplicity of actions.

On the contrary these defendants allege that a suit in ejectment with damages for withholding possession would afford this plaintiff full, complete, speedy and adequate relief in the premises.

IX.

Deny that neither of these defendants nor any person or corporation from whom they have derived their interest in said land was at the date of said order of [33] withdrawal of September 27, 1909, a *bona fide* occupant or claimant of said land or in the diligent prosecution of work leading to a discovery of oil or gas.

X.

Deny that because of the premises in said bill of complaint none of these defendants have or ever had any right, title or interest in or to said land or any part thereof or any right, title or interest in or to the petroleum, mineral, oil or gas deposit therein, or any right to extract the same from said land or to convey or dispose of the same or any part thereof; deny that the acts of these defendants or either of them who have entered upon said land or drilled oil wells or used or appropriated petroleum or gas deposited therein or assumed to sell or convey any interest in or to any part of said land were all or any part in violation of the laws of the United States or of the aforesaid order withdrawing said lands; deny that all or any of said acts were or are in violation of the rights of the plaintiff or that such acts interfere with the execution by complainant of its public

policies with respect to said land.

XI.

Admit the allegations of paragraph XI of said bill of complaint.

Seventh Defense.

As their further separate and seventh defense to the cause of action set forth in the said bill of complaint, these defendants allege:

That ever since January 8, 1907, these defendants and their predecessors in interest have held and [34] possessed the lands described in said bill of complaint and the whole thereof under claim of right thereto, openly, notoriously, continuously and adversely, and during said time taxes have been levied and assessed thereof and paid by these defendants and their predecessors in interest; that during said time these defendants and their predecessors in interest have worked said land and developed the same for petroleum and gas therein contained and in said work there has been expended upon said land large sums of money of which a considerable part was expended prior to September 27, 1909; that during said time the plaintiff has levied and assessed an income tax upon proceeds derived from the mineral obtained from said land, which said income tax has been paid by these defendants.

WHEREFORE these defendants having fully answered said bill of complaint, pray that plaintiff take nothing in this case against them and that the defendants be hence dismissed with their costs of suit and that they be awarded such other and fur-

ther relief as may appear to be just and equitable.

U. T. CLOTFELTER,

A. L. WEIL,

Solicitors for Defendants North American Oil Consolidated, Walter P. Frick, John F. Carlston, Dennis Searles, Walter H. Leimert, Wickham Havens, and Clarence J. Berry. [35]

[Endorsed]: In Equity. No. A-48. Dept. —
In the District Court of the United States, Southern District of California, Northern Division, Ninth Circuit. United States of America, Plaintiff, v. North American Oil Consolidated et al., Defendant. Answer of North American Oil Consolidated et al. Filed Dec. 2, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Received Copy of the Within Answer, this 2d day of December, 1915. Albert Schoonover, U. S. Atty., By M. L., Attorney for Plaintiff. U. T. Clotfelter, A. L. Weil, 409 Kerckhoff Building, Los Angeles, California, Telephone Main 2980. Attorneys for Defendants Named Herein. [36]

In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit.

In EQUITY—A-48.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTH AMERICAN OIL CONSOLIDATED,
PIONEER MIDWAY OIL COMPANY,

UNION OIL COMPANY OF CALIFORNIA, PRODUCER'S TRANSPORTATION COMPANY, WALTER P. FRICK, JOHN T. CARLSTON, CLARENCE J. BERRY, DENNIS SEARLES, WALTER H. LEIMERT and WICKHAM HAVENS,
Defendants.

Notice of Motion for Restraining Order and Receiver.

To North American Oil Consolidated, Pioneer Midway Oil Company, Union Oil Company of California, Producer's Transportation Company, Walter P. Frick, John T. Carlston, Clarence J. Berry, Dennis Searles, Walter H. Leimert and Wickham Havens:

You, and each of you, will take notice that the plaintiff, the United States of America, will move before the United States District Court for the Southern District of California, and the Judge thereof, M. T. Dooling, United States District Judge, at the courtroom of the said court, in the Federal Building at Los Angeles, California, on the 30th day of November, 1915, at 10 o'clock, A. M., in the above-entitled cause, for the granting of an order restraining you, and each of you, your officers, agents, servants, and attorneys, from taking or moving from the said premises [37] described in the Bill of Complaint herein, any of the mineral oil or petroleum deposited therein, or any of the gas in or under said land, and from committing in any manner any trespass or waste upon any of said land, or with

reference to any of the minerals deposited therein, pending the disposition of the said cause or the further order of this Court.

And you, and each of you, will further take notice that the plaintiff, the United States of America, will then and there move the said Court and the Judge thereof in the above-entitled cause for the granting of an order appointing a receiver for the property described in the Bill of Complaint herein, and operated by you, and each of you, and for the oil and petroleum heretofore extracted from said land, to be dealt with by the receiver in such manner as to the Court may seem proper.

The above motions will be submitted upon the verified Bill of Complaint on file herein, affidavits, records, documents, and oral testimony.

This, the 23d day of November, 1915.

E. J. JUSTICE,
FRANK HALL,

Solicitors for the Plaintiff, United States of America. [38]

A-48.

Return on Service of Writ.

United States of America,
Southern District of California,—ss.

I hereby certify and return that I served the annexed Notice of Motion for Restraining Order and Receiver on the therein-named Union Oil Company of California, Producer's Transportation Co., by handing to and leaving a true and correct copy thereof with the clerk in the offices of the above-

named personally at Los Angeles, California, in said District on the 24th day of November, A. D., 1915.

C. T. WALTON,

U. S. Marshal,

By F. G. Thompson,

Deputy.

[Endorsed]: No. A-48. In the District Court of the United States for the Southern District of California. United States of America, Plaintiff, vs. North American Oil Consolidated, et al., Defendants. Notice of Motion for Restraining Order and Receiver. Filed Dec. 1, 1915. Wm. M. Van Dyke, Clerk. T. F. Green, Deputy. [39]

In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit.

IN EQUITY—A-48.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTH AMERICAN OIL CONSOLIDATED,
PIONEER MIDWAY OIL COMPANY,
UNION OIL COMPANY OF CALIFOR-
NIA, PRODUCER'S TRANSPORTATION
COMPANY, WALTER P. FRICK, JOHN
T. CARLSTON, CLARENCE J. BERRY,
DENNIS SEARLES, WALTER H. LEIM-
ERT and WICKHAM HAVENS,

Defendants.

**Notice of Motion for Restraining Order and
Receiver.**

To North American Oil Consolidated, Pioneer Midway Oil Company, Union Oil Company of California, Producer's Transportation Company, Walter P. Frick, John T. Carlston, Clarence J. Berry, Dennis Searles, Walter H. Leimert, and Wickham Havens:

You, and each of you, will take notice that the plaintiff, the United States of America, will move before the United States District Court for the Southern District of California, and the Judge thereof, M. T. Dooling, United States District Judge, at the courtroom of said Court, in the Federal Building, at Los Angeles, California, on the 30th day of November, 1915, at 10 o'clock, A. M., in the above-entitled cause, for the granting of an order restraining you, and each of you, your officers, agents, servants, and attorneys from taking or moving from the said premises described in the Bill of Complaint herein, [40] any of the mineral oil or petroleum deposited therein, or any of the gas in or under said land, and from committing in any manner any trespass or waste upon any of said land, or with reference to any of the minerals deposited therein, pending the disposition of the said cause or the further order of this Court.

And you, and each of you, will further take notice that the plaintiff, the United States of America, will then and there move the said Court and the Judge thereof in the above-entitled cause for the granting

of an order appointing a receiver for the property described in the Bill of Complaint herein, and operated by you, and each of you, and for the oil and petroleum heretofore extracted from said land, to be dealt with by the receiver in such manner as to the Court may seem proper.

The above motions will be submitted upon the verified Bill of Complaint on file herein, affidavits, records, documents and oral testimony.

This, the 23d day of November, 1915.

E. J. JUSTICE,
A. E. CAMPBELL,
FRANK HALL,

Solicitors for the Plaintiff, United States of America. [41]

Northern District of California,—ss.

I hereby certify and return, that on the 24th day of Nov. 1915, I received the within writ, and that after diligent search, I am unable to find the within named defendants, Walter P. Frick, within my district.

J. B. HOLOHAN,
United States Marshal,
By Thos. F. Mulhall,
Deputy United States Marshal.

Return on Service of Writ.

United States of America,
Northern District of California,—ss.

I hereby certify and return that I served the annexed Notice of Motion for Restraining Order, etc., on the therein-named Joseph F. Carlston, Wickham Havens, Dennis Searles, and Walter H. Leimert, by

handing to and leaving a true and correct copy thereof with Joseph F. Carlston, Wickham Havens, Dennis Searles, and Walter H. Leimert, personally at Oakland, California, in said District on the 24th day of November, A. D., 1915.

J. B. HOLOHAN,
U. S. Marshal,
By Thos. F. Mulhall,
Office Deputy. [42]

Return on Service of Writ.

United States of America,
Northern District of California,—ss.

I hereby certify and return that I served the annexed Notice of Motion for Restraining Order, etc., on the therein-named North American Oil Consolidated and Pioneer Midway Oil Company, by handing to and leaving a true and correct copy thereof with C. F. Nance, Secretary of North American Oil Consolidated, and Miss A. E. Cole, Secty., Pioneer Midway Oil Company, personally at San Francisco, California, in said District, on the 24th day of November, A. D., 1915.

J. B. HOLOHAN,
U. S. Marshal,
By Lawrence J. Conlon,
Office Deputy.

[Endorsed]: No. A-48. In the District Court of the United States for the Southern District of California. United States of America, Plaintiff, vs. North American Oil Consolidated, et al., Defendants. Notice of Motion for Restraining Order and Re-

ceiver. Filed Dec. 6, 1915. Wm. M. Van Dyke,
Clerk. By T. F. Green, Deputy Clerk. [43]

**[Order Granting Application for Appointment of
Receiver, etc.]**

*In the District Court of the United States, for the
Southern District of California, Northern Divi-
sion.*

No. A-48—EQUITY.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTH AMERICAN OIL CONSOLIDATED,
et al.,

Defendants.

ALBERT SCHOONOVER, Esq., United
States Attorney, E. J. JUSTICE, Esq.,
FRANK HALL, Esq., and A. E. CAMP-
BELL, Esq., Special Assistants to the At-
torney General, Attorneys for the Plaintiff.
ANDREWS, TOLAND & ANDREWS, At-
torneys for Union Oil Co. and Pro-
ducers Transportation Co., CHARLES S.
WHEELER, Esq., JOHN F. BOWIE,
Esq., and A. L. WEIL, Esq., Attorneys for
North American Oil Consolidated. J. D.
LEDERMAN, Esq., Attorney for Pioneer
Midway Oil Co.

For the reasons given in U. S. vs. Consolidated
Midway Oil Co. et al., No. A-2—Equity and U. S. vs.

Thirty Two Oil Co., et al., No. A-33—Equity, this day decided, the application for the appointment of a receiver is granted, and the motions to transfer to the law side, to dismiss, to strike out and for further and better particulars are denied.

February 1st, 1916.

M. T. DOOLING,
Judge. [44]

[Endorsed]: No. A-48—Equity. U. S. District Court, Southern District of California, Northern Division. The United States of America, Plaintiff, vs. North American Oil Consolidated et al., Defendants. Order granting application for appointment of receiver, and denying motions to transfer to law side, to dismiss, to strike out and for further and better particulars. Filed Feb. 3, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [45]

Opinion.

*In the District Court of the United States, for the
Southern District of California, Northern Division.*

No. A-2—EQUITY.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

CONSOLIDATED MIDWAY OIL CO., et al.,
Defendants.

ALBERT SCHOONOVER, Esq., United States Attorney, E. J. JUSTICE, Esq., A. E. CAMPBELL, Esq., and FRANK HALL, Esq., Special Assistants to the Attorney General, Attorneys for the Plaintiff.

GEO. E. WHITAKER, Esq., Attorney for *Midnight*. Oil Co., Edith F. Coons and National Pacific Oil Co., M. S. PLATZ, Esq., Attorney for Mary F. Francis., HUNSAKER & BRITT, Attorneys for Citizens National Bank., L. C. GATES, Esq., Attorney for Title, Insurance & Trust Co., FLINT & JUTTEN, Attorneys for California National Supply Co., OSCAR LAWLER, Esq., Attorney for Four Investment Co., PILLSBURY, MADISON & SUTRO, Attorneys for Standard Oil Co., J. P. SWEENEY, Esq., Attorney for Maricopa Oil Co.

As in a number of other cases submitted at the same time, a motion is presented to transfer this case from the equity to the law side of the Court. The several grounds of the motion fall generally under one of the following heads:

1. That a plain, adequate and complete remedy may be had at law in an action in ejectment. [46]
2. That the present action is in effect one in ejectment and must be tried on the law side where the parties are entitled to a jury trial.

My conclusions as to these contentions, which a press of other matters do not afford me time to do more than state without elaboration, are as follows:

1. That ejectment does not afford a plain, adequate and complete remedy for the matters complained of in the bill of complaint herein.

2. That neither in form nor in substance is the action one in ejectment. Its purpose is the prevention of waste,—to restrain the defendants from withdrawing the oil from the lands in question. All other matters embraced in the bill are subordinate to this. When the defendants, by maintaining derricks and other structures on the lands, retain such possession as they may have acquired as against the Government, is of minor importance under the averments of the bill, so long as they do not destroy the real value and substance of the lands by withdrawing the oil therefrom before their right to do so shall have been finally determined.

It is not upon this motion decided whether such right should be finally determined by the Land Department or by the Court.

The motion to transfer is therefore denied. The motions to dismiss, to make more certain and to strike out are also denied.

February 1st, 1916.

M. T. DOOLING,
Judge. [47]

[Endorsed]: No. A-2-Equity. U. S. District Court, Southern District of California, Northern Division. The United States of America, Plaintiff, vs. Consolidated Midway Oil Co. et al., Defendant. Opinion and order denying motion to transfer to law side, to dismiss, to make more certain and to strike

out. Filed Feb. 3, 1916. Wm. M. Van Dyke, Clerk.
By Chas. N. Williams, Deputy Clerk. [48]

[Opinion.]

*In the District Court of the United States, for the
Southern District of California, Northern Division.*

No. A-38—EQUITY.

THE UNITED STATES OF AMERICA,
Plaintiff,
vs.
THIRTY-TWO OIL CO. et al.,
Defendants.

ALBERT SCHOONOVER, Esq., United States
Attorney, E. J. JUSTICE, Esq., A. E.
CAMPBELL, Esq., and FRANK HALL,
Esq., Special Assistants to the Attorney
General, Attorneys for the Plaintiff.

EDMUND TAUSZKY, Esq., Attorney for As-
sociated Oil Co., HUNSAKER & BRITT,
Attorneys for Thirty-Two Oil Co., and J.
M. McLEAD, OSCAR LAWLER, Esq.,
Attorney for Buick Oil Co., GEO. E.
WHITAKER, Esq., Attorney for Califor-
nia Midway Oil Co.

As in a number of other cases submitted at the
same time complainant moves for an injunction, and
the appointment of a receiver. In my judgment the
present status of the property in these cases should
be maintained, either by enjoining the withdrawal

of oil, or by the appointment of a receiver, until the right of defendants to withdraw oil from the land is finally determined either by the Land Department or by the Court. It seems to me that the appointment of a receiver will work less hardship to defendants than the granting of an injunction. For this reason the application for the appointment of a receiver is granted. The motions to dismiss, to strike out, to make more certain and to transfer to the law side are denied.

M. T. DOOLING,
Judge.

February 1st, 1916. [49]

[Endorsed]: No. A-38—Equity. U. S. District Court, Southern District of California, Northern Division. The United States of America, Plaintiff, vs. Thirty-Two Oil Co. et al., Defendants. Opinion and order granting application for appointment of receiver, and denying motions to dismiss, to strike out, to make more certain and to transfer to law side. Filed Feb. 3, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [50]

*In the District Court of the United States, for the
Southern District of California, Northern Division,
Ninth Circuit.*

IN EQUITY—No. A-48.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTH AMERICAN OIL CONSOLIDATED, PIONEER
MIDWAY OIL COMPANY, UNION OIL COMPANY OF
CALIFORNIA, PRODUCER'S TRANSPORTATION
COMPANY, WALTER P. FRICK, JOHN F. CARLSTON,
CLARENCE J. BERRY, DENNIS SEARLES, WALTER
H. LEIMERT and WICKHAM HAVENS,

Defendants.

Order Appointing Receiver.

This suit coming on to be heard on motion of the complainant for the appointment of a receiver and for an injunction, and having been heard on the 30th day of November, 1915.

IT IS NOW CONSIDERED, ORDERED AND ADJUDGED that HOWARD M. PAYNE, be, and he is hereby, appointed receiver of all the property described in the Bill of Complaint herein claimed by the defendants, to wit:

All of Section Two (2), Township Thirty-Two (32), South, Range Twenty-three (23) East, Mount Diablo Base and Meridian, and situated in Kern County, State of California.

and of the oil, gas and all other property of every kind [51] now situated on the said land, or already extracted therefrom, and still in the possession of defendants; and the defendants, and each of them, their agents, attorneys and employees, are enjoined from removing said oil, gas, or other property, or any part thereof, from said land, or in any manner interfering with the order of this Court, and are enjoined from further producing oil from said land, except by permission and under the direction of the said receiver.

Said receiver is directed to receive, and the said defendants are directed to surrender to said receiver all moneys in their hands or in the hands of any person or corporation for them, which are the proceeds of the sale of oil or gas produced from said lands hereinbefore described, and such persons holding such funds are directed to pay same to said receiver; and the said receiver is directed to collect any notes, accounts, or other evidence of debt due or payable on account of oil and gas produced from said land and sold by or for said defendants, or any of them.

The said receiver is given power and directed to operate any oil or gas well or wells on said property, or to permit them to be operated by the respective defendants now in possession of or operating same, or who have heretofore operated on said lands; or to close said wells, if he deems it necessary or advisable to do so in order to conserve the oil and gas in said lands and prevent said property from being damaged or the oil and gas from being wasted.

The said receiver is directed to ascertain the

quantity of oil and gas heretofore extracted by said respective defendants, and what disposition has been made thereof, and keep an account thereof, and to keep an accurate account of all oil and gas hereafter produced from [52] said lands, and to sell said oil and gas for the best price obtainable.

For the purpose of making an investigation and determining the condition of wells drilled on said lands, and particularly for the purpose of determining whether water is infiltrating the oil sands or reservoirs on said lands, and for the further purpose of ascertaining the amount of oil and gas heretofore produced, the price at which the same has been sold, and the value thereof, the receiver is directed and empowered to examine the logs of the wells and the books of account kept by the defendants or any of them in the development and operation of said lands.

For the purpose of preventing damage to said lands by the infiltration of water into the oil sands and otherwise, and for the purpose of protecting and operating the said property and carrying out the provisions of this order, the said receiver is authorized to employ such assistants and incur such expense, to be paid out of the moneys coming into his hands as receiver, as he shall deem necessary, subject to the approval of this Court.

A bond in the sum of Ten Thousand (10,000) Dollars, to be approved by this Court, shall be given by the receiver within fifteen days from the filing of this order; provided the solicitor for the complainant or for the defendants, or either of them, may at

any time upon one day's notice to counsel for the opposite parties, apply to the court for an increase in the amount of said bond.

The moneys coming into the hands of the said receiver shall, unless otherwise directed by the Court, be deposited in a bank or banks in special interest-bearing [53] accounts in the joint name of the receiver and the clerk of this court, and subject to the joint check and control of such persons, except so much of said funds as may be necessary to pay the monthly current expenses of the receiver in executing the orders of this court, and such sums as may be necessary for such purposes shall be deposited in a bank or banks to the credit of such receiver, as receiver for the respective defendants, and shall be subject to the receiver's check.

The amount of compensation to be paid to the receiver in this suit is to be determined hereafter.

This 2 day of February, 1916.

M. T. DOOLING,
United States District Judge.

[Endorsed]: No. A-48. In the District Court of the United States for the Southern District of California, Northern Div., Ninth Circuit. United States of America, Plaintiff, vs. North American Oil Consolidated, et al., Defendants. Order Appointing Receiver. Filed Feb. 3, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [54]

*In the District Court of the United States, for the
Southern District of California, Northern Divi-
sion, Ninth Circuit.*

No. A-48.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTH AMERICAN OIL CONSOLIDATED,
PIONEER MIDWAY OIL COMPANY,
UNION OIL COMPANY OF CALIFORNIA,
PRODUCER'S TRANSPORTATION COM-
PANY, WALTER P. FRICK, JOHN F.
CARLSTON, CLARENCE J. BERRY, DEN-
NIS SEARLES, WALTER H. LEIMERT,
and WICKHAM HAVENS,

Defendants.

**Notice of Lodgment of Statement of Evidence on
Appeal.**

To the United States of America, plaintiff above
named, and to E. J. Justice, Esq., Albert
Schoonover, Esq., A. E. Campbell, Esq., and
Frank Hall, Solicitors for said Plaintiff.

PLEASE TAKE NOTICE that on the 15th day
of March, 1916, defendants and appellants North
American Oil Consolidated, Walter P. Frick, John
F. Carlston, Clarence J. Berry, Dennis Searles, Wal-
ter H. Leimert, and Wickham Havens lodged with
the clerk of the above-entitled court their Statement
of Evidence to be included in Transcript on Appeal;

and that on the 25th day of March, 1916, said defendants and appellants will ask the Court or Judge to approve said Statement of Evidence.

Dated March 15th, 1916.

U. T. CLOTFELTER,
A. L. WEIL,
CHARLES S. WHEELER and
JOHN F. BOWIE,

Solicitors for said Defendants and Appellants.

[55]

Due service and receipt of a copy of the within Notice of Lodgment of Statement, also Statement of Evidence, this 15th day of March, 1916, is hereby admitted.

E. J. JUSTICE,
ALBERT SCHOONOVER,
A. E. CAMPBELL,
FRANK HALL,

Attorneys for Plaintiff.

[Endorsed]: No. A-48—Equity. In the United States District Court for the Southern District of California. United States of America, Plaintiff, vs. North American Oil Consolidated, et al., Defendants. Notice of Lodgment of Statement of Evidence to be Included in Transcript on Appeal. Filed Mar. 16, 1916. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Charles S. Wheeler, Attorney for Defendants North American Oil Cons. et al. Union Trust Building, San Francisco. [56]

*In the District Court of the United States, for the
Southern District of California, Northern Division,
Ninth Circuit.*

No. A-48.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTH AMERICAN OIL CONSOLIDATED,
PIONEER MIDWAY OIL COMPANY,
UNION OIL COMPANY OF CALIFORNIA,
PRODUCERS TRANSPORTATION
COMPANY, WALTER P. FRICK, JOHN
F. CARLSTON, CLARENCE J. BERRY,
DENNIS SEARLES, WALTER H. LEI-
MERT, and WICKHAM HAVENS,

Defendants.

**Statement of Evidence to be Included in Transcript
on Appeal.**

The motion for the appointment of a receiver was heard and determined upon the foregoing complaint and answers and upon the following affidavits:

**1. AFFIDAVITS OFFERED BY PLAINTIFF:
[57]**

[Affidavit of Schuyler G. Tryon.]

State of California,
County of Kern,—ss.

Schuyler G. Tryon, being first duly sworn, deposes and says:

That he is a citizen of the United States and over

the age of 21 years, and that his postoffice address is Maricopa, California; that for more than ten years last past he has been actively engaged as superintendent of oil-drilling operations in said county of Kern, State of California;

That in the month of March, 1910, he was employed to take charge and superintend the active work of drilling oil wells on Section 2, Township 32 South, Range 23 East, M. D. M., and that on March 15, 1910, affiant went upon said Section 2 and made a personal examination of the entire section to determine the conditions thereon; that affiant at that time found on each quarter section of said Section 2, Township 32 South, Range 23 East, a complete Standard drilling rig, including derrick, engine-house and belt-house, being four complete standard drilling rigs in all; that there was also found on each quarter section of said Section 2, a cabin or bunk-house; that affiant also found upon the SE. $\frac{1}{4}$ of said Section 2 at said time, namely, March 15, 1910, an old derrick, without boiler, engine or tools; that the appearance of said old derrick on said SE. $\frac{1}{4}$ of said Section 2 was such as to indicate that the same had been standing upon the said SE. $\frac{1}{4}$ for a considerable length of time, but that this affiant is unable to state when said old derrick was erected on said land; that at the location of this said old derrick on the said SE. $\frac{1}{4}$ of said Section 2, a hole had been drilled, but that this affiant is unable to state how deep said hole was, nor can he [58] state at this time whether or not there was any casing in said old hole; that there were no indications at or around this old derrick on the said SE. $\frac{1}{4}$ of said Sec-

tion 2, nor in and around the sump hole that had been used in connection with said old derrick, that any oil had been discovered in said old hole on the said SE. $\frac{1}{4}$ of said Section 2; and that at the time this affiant examined said land, namely, on March 15, 1910, the belt-house in connection with this said old derrick on the said SE. $\frac{1}{4}$ of said Section 2, had been blown down, and that the appearance of said old derrick, and the appearance of the ground around and adjacent to the same were such as to indicate to this affiant that no work had been performed at said old derrick for a considerable period of time prior to the date of his examination of the land, which, as heretofore stated, was about March 15, 1910.

That at the time this affiant made his examination of said Section 2, T. 32 S., R. 23 E., to wit, on or about March 15, 1910, he found that no drilling work of any kind or character had ever been done or performed upon either the NE. $\frac{1}{4}$, NW. $\frac{1}{4}$, or SW. $\frac{1}{4}$ of said Section 2, T. 32 S., R. 23 E., and that there were not upon said quarter sections of land at said date any wells in which any discoveries of oil or gas had been made; and that in fact on March 15, 1910, when this affiant made a careful examination of the land in question, namely, the NE. $\frac{1}{4}$, NW. $\frac{1}{4}$, and SW. $\frac{1}{4}$ of said Section 2, T. 32 S., R. 23 E., M. D. M., the said land was wholly undeveloped and in its native state, except for the standard drilling rigs and cabins that had been placed thereon, as aforesaid.

That affiant remained in active charge of development work on said Section 2, Township 32 South,

Range 23 E., M. D. M., from said 15th day of March, 1910, until the 1st day of March, 1911, [59] during which said period of time he visited the land in question, namely, Section 2, T. 32 S., R. 23 E., practically every day; and that during said period from March 15, 1910, to March 1, 1911, he kept an accurate record of the drilling work that was done and performed on the said section under the direction of this affiant, and that the following is a history of the drilling actually done upon the respective quarter sections of said Section 2 under the direction of affiant between March 15, 1910, and March 1, 1911, the facts as to the drilling on the respective quarter sections being given under separate headings, to wit:

Drilling Operations on SE.1/4,

Sec. 2, T. 32 S., R. 23 E., M. D. M.

That shortly after affiant's arrival on said Section 2, on March 15, 1910, as aforesaid, boilers and an engine for the drilling rig on the SE.1/4 of said Section 2 were ordered and purchased, and likewise drilling tools, cables, and casing were ordered and purchased for the drilling of a well at the location of said drilling rig on said SE.1/4 of Section 2, which well was known as Well No. 1; that said supplies and materials so ordered and purchased, arrived from time to time, and, on April 15, 1910, affiant began the actual work of setting up a boiler and engine in connection with said drilling rig for drilling a well for discovery of oil on said SE.1/4 of said Section 2; that the exact date when drilling operations actually began upon said quarter section cannot now be recalled by affiant, but affiant knows, or his

own knowledge, that actual drilling of the well at said location on the SE. $\frac{1}{4}$ of said Section 2, began between the 15th day of April, 1910, and the 28th day of May, 1910, and that on [60] May 28, 1910, said well at said location on the SE. $\frac{1}{4}$ of said Section 2, T. 32 S., R. 23 E. had been drilled to a depth of 460 feet.

Drilling Operations on SW. $\frac{1}{4}$,
Sec. 2, T. 32 S., R. 23 E., M. D. M.

That shortly after affiant's arrival on said Section 2, on March 15, 1910, as aforesaid, boilers and an engine for the drilling rig on the SW. $\frac{1}{4}$ of said Section 2, were ordered and purchased, and likewise drilling tools, cables and casing were ordered and purchased for the drilling of a well on said SW. $\frac{1}{4}$, of said section 2; that said supplies and materials to be used in the drilling of a well on the said SW. $\frac{1}{4}$ of said section 2, arrived from time to time, and in the latter part of April or the 1st of May in the year 1910, affiant began the actual work of setting up a boiler and engine in connection with said drilling rig on said SW. $\frac{1}{4}$ of said Section 2, and rigging up said rig for drilling a well for the discovery of oil on said SW. $\frac{1}{4}$ of said Section 2; that said boiler and engine were set up in connection with said drilling rig on the SW. $\frac{1}{4}$ of said Section 2, and the well drilled at said location was known as Well No. 2; that the actual work of drilling said well began on the 20th day of June, 1910; that on July 17, 1910, said well at said location on the SW. $\frac{1}{4}$ of said Section 2, was drilled to a depth of 665 feet; that nothing was done in or about the actual work

of drilling said well after July 17, 1910, until October 9, 1910, on which date the work of drilling said well was resumed, and was continued until October 12, 1910; that no work in connection with the actual drilling of said well was done after October 12, 1910, and prior to March 1, 1911, at which date this affiant ceased to have charge of the work on said Section.

[61]

Drilling Operations on the NW.1/4.

Sec. 2, T. 32 S., R. 23 E., M. D. M.

That shortly after affiant's arrival on said Section 2, on March 15, 1910, as aforesaid, boilers and an engine were ordered and purchased, and there were also ordered and purchased drilling tools, cables and casing for the equipment of said drilling rig on said NW.1/4 of said Section 2; that said supplies and materials arrived from time to time, and in the month of June, 1910, affiant began the actual work of setting up a boiler and engine in connection with said drilling rig located on the said NW.1/4 of said Section 2; that actual drilling operations began upon said quarter section at said location on the 25th day of July, 1910; that on August 22, 1910, said well, which was known as well No. 3, had been drilled to a depth of 620 feet; that nothing was done in or about the actual work of drilling said well on the said NW.1/4 of said Section 2, after August 22, 1910, and prior to March 1, 1911, at which date this affiant ceased to have charge of the work on said Section.

Drilling Operations on the NE.1/4,

Sec. 2, T. 32 S., R. 23 E., M. D. M.

That shortly after affiant's arrival on said Section 2, on March 15, 1910, as aforesaid, boilers and an engine were ordered and purchased, and there were also ordered and purchased drilling tools, cables and casing for the equipment of said drilling rig on said NE. $\frac{1}{4}$ of said Section 2; that said supplies and materials arrived from time to time, and during the last of June or first part of July, 1910, affiant began the actual work of getting up a boiler and engine in connection with said drilling rig located on said NE. $\frac{1}{4}$ of said Section 2; that actual drilling [62] operations began upon said quarter section at said location on the 5th day of September, 1910; that on September 22, 1910, said well on said NE. $\frac{1}{4}$ of said Section 2 had been drilled to a depth of 586 feet; that nothing was done in or about the actual work of drilling said well after September 22, 1910, and prior to March 1, 1911, on which last named date this affiant ceased to have charge of the work on said section.

That the wells drilled on the four quarter sections of Section 2, T. 32 S., R. 23 E., as hereinbefore set out and described, were all drilled under the supervision of this affiant, and that he kept an accurate record of the work that was performed on each well, and that he knows of his own knowledge, and from an examination of the records kept by him at the time said work was being performed, that no discovery of oil or gas was made in any of the holes that were drilled on said Section 2, Township 32 South, Range 23 East, while he was in charge of

the work on said Section, which was from March 15, 1910, to March 1, 1911.

That during the entire time affiant was in charge of drilling operations on said Section 2, the said drilling operations proceeded with all possible diligence and all said wells aforesaid were drilled as expeditiously as possible under existing conditions as to water and delivery of freight.

That during the past ten years affiant has been working in and around the oil fields of Kern County, California, and has had charge of the construction of numerous derricks such as he found standing upon each quarter section of said Section 2, T. 32 S., R. 23 E. at the time he made an examination of this land on March 15, 1910; that it has been his experience that a derrick such as he found standing upon each quarter section of Sec. 2, T. 32 S., R. 23 E., on March 15, 1910, can, under ordinary [63] circumstances, be erected in about ten days' time.

SCHUYLER G. TRYON.

Subscribed and sworn to before me, at Maricopa, Calif., this 7th day of December, 1915.

E. E. BALLAGH,

Notary Public in and for the County of Kern, State of California. [64]

[Affidavit of Silas L. Gillan.]

United States of America,
Northern District of California,
State of California,—ss.

Silas L. Gillan, being duly sworn, on oath deposes and says:

I am a citizen of the United States over the age of 21 years. I am a graduate mining engineer and during most of the period of the last five years I have been engaged in the California oil fields as mineral inspector of the General Land Office of the United States, and as such have examined and reported to said General Land Office as to the conditions of, and development work being carried on in, said oil fields.

I visited Section 2, Township 32 South, Range 23 East, M. D. M., on the 7th day of December, 1915. At said time I found on said Section, ten wells producing oil. From six of said wells oil was being pumped and from four of said wells oil was flowing without being pumped.

SILAS L. GILLAN.

Subscribed and sworn to before me this 9th day of December, 1915.

[Seal]

C. W. CALBREATH,
Deputy Clerk U. S. District Court, Northern District
of California. [65]

2. AFFIDAVITS OFFERED BY DEFENDANTS, NORTH AMERICAN OIL CONSOLIDATED, WALTER P. FRICK, JOHN F. CARLSTON, CLARENCE J. BERRY, DENNIS SEARLES, WALTER H. LEIMERT AND WICKHAM HAVENS: [66]

[Affidavit of I. Strassburger.]

State of California,

City and County of San Francisco,—ss.

I. Strassburger, being first duly sworn, deposes and says:

That during the years 1908, 1909, and 1910, he was manager of the Pioneer Midway Oil Company of California, a Corporation; that up to the month of March, 1910, the Pioneer Midway Oil Company was the owner of the following oil placer mining claims, to wit:

Banter No. 1, being the Northwest Quarter of Section 2, Township 32 South, Range 23 East, M. D. B. & M.

Banter No. 2, being the Northeast Quarter of said Section 2;

Banter No. 3, being the Southeast Quarter of said Section 2;

Banter No. 4, being the Southwest Quarter of said Section 2;

That said placer mining locations were located under the placer mining laws of the United States prior to the 27th day of September, 1909, and that prior to said date said Pioneer Midway Oil Company had caused to be erected on each of said quarter sections of land dwelling-house for its men, and had caused to be erected on each of said quarter sections a complete standard drilling rig, including derrick, engine house, belt-house, and rig irons.

That said work was done at a total expense of Two Thousand Nine Hundred Dollars, (\$2,900.00); that after the completion of said rigs and equipment on said lands, it was the intention of [67] the Pioneer Midway Oil Company to immediately proceed with the work of development thereon, and to start the drilling of wells on said four quarter sections, but that it was impossible to obtain any

water for the purpose of drilling said wells; that it is necessary in the drilling of an oil well that there be a constant supply of water on hand, and that the failure of water or the failure of an adequate supply of water at all stages of the drilling operations will inevitably result in large and serious loss to the drilling company by reason of the sticking of the casing, and in many instances the failure of sufficient water for drilling requires the abandonment of the well.

That during the period of time from the completion of said derricks up to and including the month of March, affiant made constant and diligent efforts to secure an adequate supply of drilling water.

That affiant was interested in the drilling of an oil well on Section five in the same township and range, two miles to the West of the land involved in the above-entitled action, and on said land was securing water from the Stratton Water Company; that the supply furnished by the Stratton Water Company was totally inadequate and very seriously handicapped the operation on said Section 5; that there never was at any time sufficient water on said Section 5 to drill more than one well, and this well was often shut down by reason of the failure of water.

That said Section 5 is within a mile of said Stratton Water Company, and it being impossible to obtain an adequate supply of water at this point, there was no water to be carried for the additional distance over to Section 2. [68]

That up to the time of the sale of said property by the Pioneer Midway Oil Company about the mid-

ing all of said year the said company was the owner and in possession of all of Section 2, Township 32 South, Range 23 East, M. D. B. and M., in Kern County, California.

That between the 21st day of June, 1909, and the 27th day of September, 1909, work leading to a discovery of oil upon each of the quarters of said section was diligently prosecuted. In that behalf this deponent avers:

That prior to the 21st day of June, 1909, the said corporation had determined to proceed with drilling upon the said section at the earliest possible moment and to that end had determined to put in the necessary machinery and establish a camp, and employed the necessary men for the purpose of proceeding with the said drilling; that it was the intention of said corporation to drill at least one well upon each of the four quarters of the said section.

That on said 21st day of June, 1909, two boilers for use in drilling wells on said section were purchased; that sometime between said 21st day of June, 1909, and said 27th day of September, 1909, the said boilers were taken to the said Section 2 and were deposited at a point near the center of the said section and were placed upon the ground in such a position that the same could be used for drilling wells upon all of the four quarters of said section. [70]

That deponent does not know the exact date on which the said boilers were taken to the said ground but he believes it to have been shortly before the said 27th day of September, 1909.

That deponent acting for said Company directed

that a camp be established upon the said Section for the purpose of drilling wells upon each of the quarter sections thereof, shortly prior to the 21st day of June, 1909, and on said 21st day of June, 1909, received a report from the superintendent of said property wherein the said superintendent stated: "I will establish a camp down on Section 2 as soon as possible and will commence the erection of those boilers."

That it was intended that the establishment of the said camp referred to in the report of the said superintendent should be coincident with the beginning of drilling upon the said property; but that the same was not established for the sole reason that it was not possible to get water upon the said Section at the said time and that said condition of affairs existed so that it was impossible to get water on the said Section in sufficient quantity for drilling at any time prior to the 27th day of September, 1909, and for several months thereafter.

That this deponent being desirous of procuring water on the said section arranged to have a well sunk for the purpose of finding water and to that end a derrick was set up on the said section some time during the said year and prior to the 27th day of September, 1909, but at what precise date deponent does not now recall and a hole was sunk to a considerable depth, but water was not discovered therein and the said work was subsequently given up and abandoned and the method of obtaining water by drilling upon said land was thenceforth believed by this deponent to be hopeless. [71]

That the said corporation was ready, able, anxious and willing to proceed with drilling wells upon each of the four quarters of the said section and would have begun the drilling thereon immediately after the said 21st day of June, 1909, but for the said difficulty with water.

That employees of the said corporation were in actual physical possession of each of the four quarters of the said Section 2 and were actually living and laboring thereon on said 27th day of September, 1909; that on or about the said 27th day of September, 1909, the said employees were performing labor in clearing brush and leveling ground for the construction of the proposed drilling plants of the said corporation and that the said work of brushing out was done upon each of the said four quarters of said section respectively.

I. STRASSBURGER.

Subscribed and sworn to before me this 27th day of December, 1915.

ALICE SPENCER,

Notary Public in and for the City and County of
San Francisco. [72]

[Affidavit of M. J. Laymance.]

State of California,

County of Alameda,—ss.

M. J. Laymance, being first duly sworn, deposes:

That he is a member of a syndicate which purchased Section 2, Township 32 South, Range 23 East, M. D. B. & M., from the Pioneer Midway Oil Company.

That at the time of the purchase of said land there was a complete drilling rig and bunk-house on each of the quarter sections of said Section.

That upon the acquisition of said land, on or about the 1st of March, 1910, immediate steps were taken to commence drilling on all four quarters of said Section in the way of getting tools, machinery and arranging for water; that the first work done was in the way of laying a water line; a two-inch water line to all derricks and buildings was laid; that the first arrangement for water was through the permission of the Union Oil Company to make a connection with their water line through which they were getting water from the Stratton Water Company, a delay of three weeks ensued in getting water through the line after the line was laid, and actual drilling commenced on April 28, 1910;

Sufficient water could not be obtained to run more than one string of tools;

That during all periods the railroads failed, despite the efforts of shippers, to deliver freight promptly anywhere in the Midway District, and particularly at Taft, which was the freight station in Section 2 in said Midway Field; that the failure of the railroads to give prompt or adequate service was general in said Midway District; that during said period there was an exceptionally large demand for casing for wells [73] and the manufacturers of casing, because of the unusual demand, were unable to supply demands promptly, or fill orders with any degree of certainty or promptness; that there were often delays in shipment after orders for casing

were given and delays in delivery by the carrier after shipment was made.

That all materials and supplies were hauled by railroad to Taft and thence by wagon to Section 2; that there were particularly delays in securing delivery of casing.

That during all periods there was an insufficient supply of water; that this condition was due to the fact that said Section 2 is located in arid country; and that the demand for water greatly exceeded the available supply; that at no time was there sufficient water to drill more than one well until October, 1910, when affiant succeeded in getting water from a new well on said Section 2; that said well proved insufficient and shortly after beginning to use water from said well, affiant laid a two-inch pipe-line from the center of Section 2 to Section 34; that said pipe-line was laid and connected with a line supplying water from Buena Vista Lake; that the owners of said source of supply would not allow a larger connection than a two-inch pipe to be made with their water line, and limited the supply of water to Section 2 to an amount adequate to drill but one well at a time;

That as a result of the conditions it was impossible to drill wells on each quarter section simultaneously.

That affiant made every effort to get water in additional quantities, but was unable to do so; that as a result of the water situation, and the limited supply available, affiant was [74] compelled to rotate the work of drilling on said quarter sections,

drilling only one well at a time; that during the entire time that affiant was interested in said property, drilling operations were continued with all possible diligence, and all said wells were drilled as expeditiously as possible under existing conditions as to water and delivery of freight.

That the Northeast, Northwest, Southeast and Southwest quarters of said Section 2 were all located as placer mining claims, and constituted a group of claims lying contiguous and owned by the same persons, and that all labor done on one of said claims for the discovery of oil tended to the development to determine the oil-bearing character of the contiguous claims.

M. J. LAYMANCE.

Subscribed and sworn to before me this 18th day of December, 1915.

C. H. ELIASSEN,

Notary Public in and for the County of Alameda,
State of California. [75]

[Affidavit of E. W. Kay.]

State of California,

City and County of San Francisco,—ss.

E. W. Kay, being first duly sworn, deposes:

That he was during all of the time hereinafter mentioned Manager of the Stratton Water Company; that he is not a party to nor in anywise interested in the above-entitled action.

That from August, 1909, to July, 1910, the Stratton Water Company was engaged in the business of producing and selling water in the North Midway

Field; that during said time, it had three producing wells; that two of said wells were of little value, and all the water they could produce in 24 hours could be pumped out in an hour and a half; that during said period of time, Stratton Water Company at no time, operating its wells for full capacity during twenty-four hours, could produce in excess of 3,300 barrels of water.

That during said period of time the Stratton Water Company had applications from Oil Companies desiring water for 16,000 to 20,000 barrels a day; that Stratton Water Company actually entered into arrangements to supply from sixteen to twenty oil companies with water at from seven to nine cents a barrel; that the requirements of these companies were for not less than 7,500 barrels a day for current use, and it was necessary in the interests of due caution that each company should have from 700 to 1,000 barrels of water on hand to hold down heaving sands which would destroy the well; that in the endeavor to supply the requirements of its companies with which it had contracts, and which companies needed 7,500 barrels a day with the 3,300 barrels total output of the Stratton Water Company, it was the policy of the company to divide this water up as equally and equitably as possible. [76]

That in pursuance of this policy, whenever one well got into serious trouble and was in urgent need of a large amount of water, it was customary to shut off the water supply of the other companies and supply the necessities of the company that was in trouble.

That during said period of time, one of the companies which it supplied with water was the Mays Oil Company; that this company was supplied through a two-inch pipe-line which was built by the Mays Oil Company, and ran for a distance of about three and a half miles; that at no time could the Stratton Water Company, in view of its contracts, have furnished the Mays Oil Company with enough water to run more than one well; that it was the policy of the Stratton Water Company never to supply its customers with more than enough water to run one well; that the well of the Mays Oil Company was often shut down on account of lack of water, and that said company lost a string of casing and finally lost the well, and had to start a new one by reason of failure of water supply.

That during this period of time, there was no other water supply in the Midway Field, except the water that was brought in by the Chanslor-Canfield-Midway Oil Company; that the Chanslor-Canfield-Midway Oil Company had only enough water for its own use and a few immediate favored neighbors;

That the Stratton Water Company, during this period of time, attempted to increase their supply of water without any material result;

That representatives of the Mays Oil Company, during this period, visited affiant from two to eight times a day, urging affiant to maintain a steady supply of water at the drilling well, and to give them water for the other wells; that from the location of the Water Company's property, it was possible for [77] affiant to see the other wells, and that on

many occasions when water was shut off from the well for the purpose of aiding some other property that was in difficulties, affiant could see the superintendent of the shut-down property getting into his conveyance to visit affiant and that thereupon affiant would turn the water into the line of that property, and thus satisfy the superintendent when he arrived, and as soon as the superintendent left, he would shut off the water again, so that by the time the superintendent returned to his property they would be without water.

That affiant does not now recall whether the operators of Section 2, Township 32 South, Range 23 East, M. D. M. & M. applied to the Stratton Water Company for water, but had they applied, it would not have been provided, as there was not sufficient water to fill their engagements that had already been made; that it was practically impossible to haul water in wagons to the Mays Oil Company on account of the bad grade which would have tilted the water out of the wagons.

Affiant further states that when he first started operations in the Midway Field, it took three and a half days to make twelve and a half miles with teams loaded with lumber; that in hauling water, it cost fifty-five cents a barrel to haul the water, and the mules would drink half the water that was being hauled while they were getting it there.

E. W. KAY.

Subscribed and sworn to before me this 17th day of December, 1915.

FLORA HILL,
Notary Public in and for the City and County of
San Francisco, State of California. [78]

[Affidavit of Louis Titus.]

State of California,
City and County of San Francisco,—ss.

Louis Titus, being first duly sworn, deposes and says:

That he is the President of North American Oil Consolidated, a corporation, and has been the President of said corporation from the time it was organized in December, 1909, down to the present time.

That North American Oil Consolidated succeeded to the property and interests of a corporation known as the "Hartford Oil Company," and that this affiant was the President of said Hartford Oil Company from the time of its incorporation in May, 1909, down to the date of the dissolution of said corporation sometime in 1910. That said Hartford Oil Company was operating upon Section 16, Township 32 South, Range 23 East, M. D. B. & M., Kern County, California, during the year, 1909, and drilling wells thereon; and also on Section 22, same township and range, during the same period of time. That in January, 1910, said operations were taken over by said North American Oil Consolidated and have been conducted thereon ever since, down to the present time. That in February, 1910, said North

American Oil Consolidated began operations on Section 26, same township and range; and also upon Section 15, same township and range. That the operations on all the foregoing property included the drilling of a considerable number of wells. That the above sections of land, with the exception of Section 15, were patented sections, the land in Section 22 and Section 26 having been patented by the United States Government to the predecessors in interest of the corporation above mentioned, under placer mining locations.

That beginning in January, 1910, and continuing throughout the year 1910 and a part of 1911, said corporation was operating on Sections 27 and 28, same township and range. Said sections [79] 27 and 28 were not patented claims but were held under placer mining locations.

That from the beginning of the operations of said Hartford Oil Company the greatest difficulty was experienced by said Company in procuring sufficient water with which to drill its wells. The only sources of water supply available in that portion of the field at that time was one water system owned by H. C. Stratton, (which was afterwards turned over to the Stratton Water Company, a corporation); and a second water system belonging to a corporation called the "Chanslor-Canfield Midway Oil Company," which was in fact, owned and operated by the Santa Fe Railroad Company. That this affiant personally made efforts in the beginning to secure water from said Chanslor-Canfield Midway Oil Company but was positively refused, the officers of

said Company claiming that they had no water to sell, all the water they had being required for their own purposes. That he did succeed in buying water from H. C. Stratton, and the first water was delivered to Hartford Oil Company by said Stratton in May, 1909, and thereafter more or less water was delivered by said Stratton Water Company to the corporation above mentioned for a period of several years. That said source of water supply was very inadequate and inefficient; that there was never more than sufficient water to drill one well at any one time, whereas said corporation very much desired to drill several wells at the same time. That many times operations had to be shut down because there was no water to operate even one string of tools. That these delays were expensive and costly because of the danger of losing the casing in the hole and because the labor had to be paid for whether the tools were being operated or not. [80]

That this affiant expostulated with said Stratton and other managers of the said water company, many times over the inadequacy and inefficiency of the service, but said company was totally unable to supply any greater amount of water because their system was insufficient and had no greater capacity.

That thereupon, toward the end of 1909, this affiant despaired of getting water in sufficient quantities from the said Stratton Water Company and began negotiations again with the Chanslor-Canfield Midway Oil Company; and that he finally succeeded in purchasing some water from the said Chanslor-Canfield Midway Oil Company. That said com-

pany would make no promise that it would furnish any particular amount of water, but that it would allow us to turn the water on when there was water in the pipes to be had. That this source of supply was also very inefficient and totally inadequate to meet the wants of said corporation, North American Oil Consolidated. Nevertheless, said corporation continued to buy water from both of said water companies during the early part of 1910. That early in 1910, despairing of getting sufficient water from these two water companies, or from any other source that was apparently available, this affiant caused to be constructed a side track along the railroad, running across a portion of the property of the North American Oil Consolidated on Section 15; and thereupon for a period of several months, beginning with September, 1910, water was shipped by train-load to said North American Oil Consolidated, from Bakersfield to said side track on Section 15, and from there was pumped to Section 22, Section 16 and Section 26. That said operation required the laying of long strings of pipe and the installing of expensive pumping machinery. That this method of procuring water proved to be so expensive that it was not practicable and was finally abandoned in April, 1911. [81]

That Section 2 is in the same general locality as the sections heretofore mentioned as being operated by North American Oil Consolidated; that the said general conditions as to water existed on Section 2 as existed on the sections hereinbefore mentioned, excepting for the fact that neither the Stratton

Water Company nor the Chanslor-Canfield Midway Oil Company had any water line within several miles of Section 2; and had either of said companies had a water line reaching to Section 2 they could not have supplied said Section 2 with water for the reason that they could not supply their own demands and the customers they already had, as heretofore related. That there was no other water company anywhere at all in the vicinity of Section 2, and there was no water available for the development of Section 2 down to sometime in 1910, when the predecessors in interest of the North American Oil Consolidated on Section 2 made an arrangement whereby a very small amount of water was procured. This supply was very inadequate and was never sufficient to drill more than one well at any one time, and there was no other possible source of supply for water during the year 1909 and down to the latter part of 1910.

It is, of course, true that water could have been hauled in wagons for many miles and across a country having no roads. It would have been a physical possibility to have drilled wells in this manner, but as a practical commercial proposition it was absolutely prohibitive and the cost would have been so colossal that no well could have been drilled with any profit no matter how great the returns from such a well. The whole country in which Section 2 is located is an arid country, almost desert in character, with practically no vegetation; and no surface [82] water and no well water could be had except at extraordinarily great depth. During 1909, and

until the latter part of 1910, it was not known nor even supposed that any water could be procured from wells at any depth whatever. All of the surrounding drilling at that time had tended to prove that no water in any quantities could be obtained from such wells, and it was only after 1910 it was found that, by drilling very deep wells and installing expensive pumping machinery, water in commercial quantities could be lifted from some wells in that vicinity; all water from such wells being salty and totally unfit for domestic purposes, but could be used for the purpose of drilling wells.

That in drilling an oil well large quantities of water must be constantly used, and any stoppage in the water supply while a well is being drilled is almost sure to be disastrous, frequently resulting in freezing of the casing, thus making an additional expense of several thousand dollars; and, moreover, such lack of water very frequently results in absolutely ruining the well, necessitating an abandonment of that particular well and beginning all over on a new well.

That during the early part of 1910, this affiant, seeing that there would be great difficulty in procuring any adequate water supply for drilling in said locality, together with certain of his associates, employed engineers and began plans for bringing in a source of water supply that would be adequate to meet the requirements (at least in some small degree) of said locality. That in pursuance of this employment, said engineers caused certain surveys to be made from Pine Cañon in the Santa Barbara range of

mountains for a distance of over forty miles to said Midway field; and complete plans and specifications were made for the laying of a pipe-line for said distance. Bids were actually procured for the building of said pipe-line upon [83] said specifications, whereupon it was found that the cost of building said pipe-line would be prohibitive and would be much greater than any possible return from the same would warrant.

That this affiant and his associates spent altogether approximately Ten Thousand Dollars (\$10,000.00) in making said surveys and in endeavoring to find an adequate source of water supply. That this expense was incurred beginning in the very early part of 1910, down to the beginning of 1911. That at all the times mentioned in this affidavit this affiant was acquainted with the owners of Section 2 involved in this action. That he knew of the difficulties the owners of Section 28 were having in procuring water at all times beginning with the middle of 1909, down to the end of 1910. That as a practical commercial proposition it was impossible to have procured water for Section 2 for purposes of drilling at any earlier time that the same was actually procured. That he was thoroughly familiar with all possible sources of water supply during 1909 and 1910 for said locality; and that this affiant does not believe that by any degree of diligence, or any expenditure within the bounds of reason, any supply of water sufficient for drilling purposes would have been procured in an manner for Section 2 at any

earlier period of time than the same was actually procured. [84]

That early in 1910 this affiant consulted the owners of Section 2 for the purpose of determining whether said owners would purchase water for drilling from this affiant and his associates if they succeeded in bringing an adequate supply to said locality. That this affiant was assured at that time by the owners of Section 2 that they would be only too glad to purchase water from this affiant or from anyone else who could furnish it to them.

That said North American Oil Consolidated, together with its predecessors in interest, has been in the actual and notorious possession of said Section 2, and working the same to the knowledge of this affiant, for more than six years, prior to the commencement of this action.

That the said North American Oil Consolidated acquired, and entered into possession of, said properties in the month of July, 1913, and from that time forward this deponent has been the president of said corporation and has had the active management of its affairs.

That at the time that the North American Oil Consolidated took possession of said Section 2 as aforesaid there were situate on the said section three completed wells in which oil had been discovered in paying quantities and there was one well upon which drilling had been started, and which had been partially drilled.

That since the said North American Oil Consolidated acquired the said properties it has erected

upon the said properties elaborate improvements and drilled seven new wells and has also proceeded with the drilling work that was in progress at the time that the said properties were acquired.

That the said North American Oil Consolidated has during the said period laid out and expended in improvements upon [85] said property and in drilling wells and in exploration and development work a sum in excess of \$350,000, and that the improvements now upon the said property are of a value in excess of \$350,000.00.

That the occupation of the said Section 2 by the said North American Oil Consolidated and its predecessors in interest were and have been at all times open, notorious and were at all times actually known to the Land Department of the United States Government and that whatever activities in the way of development and improvement of the said property have taken place were with the full knowledge of the officers and agents of the Land Department of the United States. That during all of the said period of time the said North American Oil Consolidated has given to the agents of the Land Department free access to its books and records of all kinds and the said United States Government has at all times during the said period had actual reports and knowledge of the improvements that the said corporation was making upon said property, and has had access to the books and papers of said corporation showing the amount of oil that it had extracted and was extracting, and showing the contractual obligations which said corporation was under in the matter of

its equipment and the disposition of its oil supply.

That during all of the said time the plaintiff through the officers and agents of its Land Department has had actual knowledge that the defendant, North American Oil Consolidated, was in possession of the said property under a claim of right, and it has during all of said period of time and until the filing of this suit stood by and knowingly permitted the said defendant corporation, without objection, to make the aforesaid [86] expenditures of money and to extract oils from said properties and to incur obligations in and about the development of said property, and to develop the said property to its present condition and to extract therefrom the very oil the value of which it is here seeking to recover.

That deponent is informed and believes and on such information and belief avers that similarly with full knowledge of the facts concerning the location and possession and the work that had been done upon the said Section 2 on and prior to the 27th day of September, 1909, plaintiff stood by and knowingly permitted the predecessors in interest of the said North American Oil Consolidated to remain in undisputed possession of the said premises and to expend, in work and labor tending to the development of oil on said property, upwards of \$200,000.00. That the money so expended had been expended in large part in developing the identical wells upon the said property which were producing oil at the time that the said North American Oil Consolidated purchased the said property, and that the purchase of the said property by the said North American Oil

Consolidated was largely induced by the said developments. That because of the said development the said North American Oil Consolidated has paid to its predecessors in interest more than \$500,000.00 and expects to pay to said predecessors in interest the additional sum of upwards of \$700,000.00 for said property.

That deponent as president of said North American Oil Consolidated has made a rigid and careful study of the most economical methods of handling the business conducted by the said corporation.

That the said business is one which deals with large quantities of oil and with a very great number of items of expense, and that the difference of a very few mills or cents upon [87] each item involved results in great aggregate loss or gain to the said corporation; that the business is one requiring for its successful conduct careful training and years of experience and calls for all of the energy and painstaking perseverance of self-interest in order that such business shall be economically and advantageously administered; and in order that its wells may continue to produce. That without such an administration of said corporation's business great and irreparable loss will result to the said business and to the said corporation and its stockholders.

That men trained in the said business and who have the time at their command and are in a situation to devote the necessary energy to conduct such a business would be very difficult to find; that deponent in his own experience has found it impossible to himself select or procure thoroughly satisfactory

assistants in such work, regardless of the amount that he has been prepared to pay therefor. Deponent verily believes that it is most improbable that this court could find a person to act as Receiver of said business who would administer the said business without serious and irreparable loss and detriment to the said corporation and its stockholders.

That in the judgment of this deponent a Receiver cannot be appointed to take charge of and operate the said properties without irreparable loss and injury to the said corporation.

That the said corporation is fully able to respond in damages for any detriment the plaintiff may suffer pending this litigation.

LOUIS TITUS.

Subscribed and sworn to before me this 27th day of December, 1915.

C. B. SESSIONS,

Notary Public in and for the City and County of San Francisco, State of California. [88]

[**Affidavit of Colin C. Rae.**]

State of California,

County of Los Angeles,—ss.

Colin C. Rae, being first duly sworn, deposes and says:

That he is now, and at all times herein mentioned was a citizen of the United States, over the age of twenty-one years; that his postoffice address is 1003 Higgins Building, in the city of Los Angeles, county and state aforesaid.

That he has investigated the conditions existing

in the Midway Oil Fields, so called, in Kern County, from September 1, 1909, to and including July 2d, 1910, with reference to facilities for the drilling of oil wells, and affiant states that from his examination of the conditions existing at said time development was retarded and rendered costly and uncertain by lack of a proper water supply.

That on September 27th, 1909, the only companies selling water in the Midway Oil Fields were the Chanslor-Canfield Midway Oil Company and the Stratton Water Company.

That in 1905 the Chanslor-Canfield Midway Oil Company installed a 3-inch water line from some water wells on Section 23-30-21, which is in the Santa Maria Valley, about 3 miles west of McKittrick, and ran the line along the foothills to Section 17-31-22, and then to what is known as the 25 Hill District in the Midway field. The wells were shallow, being only 70 or 80 feet deep and were dug in the earth.

That the Chanslor-Canfield Midway Oil Company, in addition to supplying water for its own development, sold water to various consumers whose land was contiguous to said water pipe-line.

That the quantity of water called for was greater than the supply, and therefore, in the latter part of 1908 the Chanslor-Canfield [89] Company commenced the installation of a 6-inch pipe-line to take the place of the old 3-inch line. This line was finished in 1909, and was about 25 miles in length. When the line was completed it was found that the water wells would not produce sufficient water to

supply the demand, and consequently the wells were deepened but with no better results.

That in April, 1909, the drilling of new wells was commenced and work continuously carried on until October, 1909, during which time 8 wells were completed, and with more or less success as to production of water.

That when said wells were completed it was found that the pump used to force the water through the 6-inch water line was inadequate and a Snow pump was ordered in the East. This pump was put in operation in the latter part of August, 1909, but proved to be too small, and another *until* was ordered, but was not put in operation until about October, 1910, and until the new unit was installed the capacity of the line was not materially greater than the old 3-inch line which had been in use prior to building the new 6-inch line.

That in addition to the new water wells, pumps and lines, it was necessary to install several 2,000-barrel tanks, which was done at various points in the field, as well as 3 100-h. p. boilers and several Luitweiler pumps, and that the cost of said water system was in the neighborhood of \$200,000.00.

That the number of consumers served by said Chanslor-Canfield Midway Oil Company was at no time in excess of 30, and during the period from September, 1909, to July 2d, 1910, there was constant trouble, and at many times an insufficient quantity of water for development purposes. [90]

That by reason of the insufficiency and uncer-

tainty of the water supply, the development of oil wells was retarded.

That the Chanslor-Canfield Midway Oil Company distinctly stipulated with its consumers as to said uncertainty and assumed no liability in any way.

That at all times during said period there was a far greater demand for water than the Chanslor-Canfield Midway Oil Company could supply, and that said company actually had, at all times herein mentioned, a waiting list of individuals and companies who desired water for development purposes.

That the Stratton Water Company secured water from a well originally sunk for oil, in the northeast corner of Section 7, Township 32 South, Range 27 East.

That a 3-inch pipe-line, five miles in length from said well was run in a general southeasterly direction along the foot-hills to what is known as the 25 Hill District, in the Midway Field.

That the water sold by this company was not, as a matter of fact, fit for use in boilers.

That said company could not supply the demand made upon it for water.

That the supply was uncertain and that development was actually stopped on several sections or portions thereof because of failure of water supply.

That by reason of the inability to obtain water in the Midway Field some of the larger companies put in private water systems at a large expenditure of money.

That in 1908 the Standard Oil Company investigated the various sources of water supply in the

Midway Field, but could not obtain water for the operation of its pump station for development purposes. [91]

That said Standard Oil Company in 1908 entered into a contract for the sinking of a water well on Section 1, Township 32 South, Range 23 East, M. D. B. & M.

That a well was sunk, but said company was not successful in developing a water supply from said well.

That said company being unable to secure water for the operation of its oil pipe-line and for the development of its properties, developed a water supply at Rio Bravo, a distance of 23 miles from Taft, Kern County, California, and brought water into the Midway Field through the said oil pipe-line.

That oil was pumped a few days to Rio Bravo, the line cleared and water pumped back from Rio Bravo to tanks in the Midway Field.

That this water was the only water used by Standard Oil Company for development work in Midway Fields; that this mode of supplying water was used by said company until 1910, when a separate water pipe-line was constructed from Rio Bravo to the Midway Field.

That said company did not supply water to any other person or company, and based its refusal so to do on the ground that it did not have water enough for its own development and use.

That in order to carry on development work in the early part of 1909 the Honolulu Oil Company by reason of said universal scarcity of water, investigated

possible sources of supply, and drilled a well for the purpose of securing a water supply near Buena Vista Lake.

That said company was not successful in securing suitable water for its said needs, and entered into negotiations with the Buena Vista Reservoir Association, and through a private arrangement secured water from said Buena Vista Lake, which was conveyed by means of a water pipe-line to the properties of the said Honolulu Oil Company in the Midway Field. [92]

That said water pipe-line system was constructed at a cost of many thousands of dollars, and the Honolulu Oil Company did not furnish any person or company with water, giving as a reason the fact that the said water pipe-line would not supply any more than enough water for the use of said company.

That by reason of the inability of operators to secure water for development purposes and their great need therefor, a co-operative organization, known as the Kern Midway Water Company, was organized, and brought water in to said Midway Field in tank cars.

That at no time was the amount of water secured in this manner sufficient for the needs of the said organization.

That cars for said purpose were secured with great difficulty and that said supply was unreliable.

COLIN C. RAE.

Subscribed and sworn to before me this 16th day of December, 1915.

BERTHA L. MARTIN,
Notary Public in and for the County of Los Angeles,
State of California. [93]

The foregoing Statement of Evidence on Appeal is found to be full, true and correct, and the same is hereby approved.

Dated March 29, 1916.

M. T. DOOLING,
Judge.

[Endorsed]: No. A-48—Equity. In the United States District Court for the Southern District of California. United States of America, Plaintiff, vs. Consolidated Mutual Oil Company et al., Defendants. Statement of Evidence to be Included in Transcript on Appeal. Lodged Mar. 16, 1916. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. U. T. Clotfelter, A. L. Weil, Charles S. Wheeler and John F. Bowie, Attorneys for Defendant, North Am. Oil Con., Union Trust Building, San Francisco. Filed Apr. 1, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [94]

*In the District Court of the United States, for the
Southern District of California, Northern Divi-
sion, Ninth Circuit.*

No. A-48.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTH AMERICAN OIL CONSOLIDATED
et al.,

Defendants.

Stipulation on Severance.

WHEREAS, a judgment or order has been made and entered appointing a Receiver in the above-entitled action; and,

WHEREAS, the defendants North American Oil Consolidated, Walter P. Frick, John F. Carlston, Clarence J. Berry, Dennis Searles, Walter Leimert and Wickham Havens, desire and intend to appeal therefrom; and,

WHEREAS, the defendant Pioneer Midway Oil Company, Union Oil Company of California, Producers Transportation Company, do not desire or intend to appeal from such order; and

WHEREAS, under such circumstances it is proper that an order of severance be made permitting the said defendants North American Oil Consolidated, Walter P. Frick, John F. Carlston, Clarence J. Berry, Dennis Searles, Walter Leimert, and Wickham Havens to prosecute their said appeal without joining the other defendants.

NOW, THEREFORE, IT IS HEREBY STIPULATED that such an order may be made; and it is further stipulated that notice to appear on the application for order allowing appeal be, and the same is hereby waived. [95]

ANDREWS, TOLAND and ANDREWS,
Attorneys for Defendants Union Oil Company of
California and Producers Transportation Com-
pany.

J. D. LEDERMAN,
Attorney for Defendant Pioneer Midway Oil Com-
pany.

A. L. WEIL,
U. T. CLOTFELTER, and
CHARLES S. WHEELER and
JOHN F. BOWIE,
Attorneys for Defendants North American Oil Con-
solidated, Walter P. Frick, John F. Carlston,
Clarence J. Berry, Dennis Searles, Walter Lei-
mert, and Wickham Havens.

Pursuant to the foregoing stipulation, IT IS HEREBY ORDERED that North American Oil Consolidated, Walter P. Frick, John F. Carlston, Clarence J. Berry, Dennis Searles, Walter Leimert, and Wickham Havens, defendants above named, be allowed to prosecute their appeal alone, without joining the other defendants.

Dated March 3, 1916.

M. T. DOOLING,
Judge.

[Endorsed]: Original. No. A-48—Equity. In
the United States District Court for the Southern

District of California. United States of America, Plaintiff, vs. North American Oil Consolidated et al., Defendants. Stipulation on Severance. Filed Mar. 4, 1916. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Charles S. Wheeler, Attorneys for Defendant, North American Oil Consolidated, Union Trust Building, San Francisco. [96]

In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit.

No. A-48—EQUITY.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTH AMERICAN OIL CONSOLIDATED,
PIONEER MIDWAY OIL COMPANY,
UNION OIL COMPANY OF CALIFORNIA,
PRODUCERS TRANSPORTATION
COMPANY, WALTER P. FRICK, JOHN
F. CARLSTON, CLARENCE J. BERRY,
DENNIS SEARLES, WALTER H. LEIMERT and WICKHAM HAVENS,

Defendants.

Petition for Appeal and Order Allowing Appeal.

To the Honorable Court Above Named:

North American Oil Consolidated, a corporation,
Walter P. Frick, John F. Carlston, Clarence J.
Berry, Dennis Searles, Walter H. Leimert, and

Wickham Havens, defendants in the above-entitled action, considering themselves aggrieved by the order made and entered in the above-entitled cause on the 3d day of February, 1916, by which said order or decree a Receiver was appointed, said order being an interlocutory order or decree appointing a Receiver, hereby appeal from said order or decree to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, for the reasons specified in their Assignment of Errors filed herewith, and pray that their appeal may be allowed, and that a transcript of the record, proceedings and papers upon which such decree was made and entered as aforesaid, duly authenticated, may be sent to the United States Circuit [97] Court of Appeals for the Ninth Circuit, sitting at San Francisco, California.

And your petitioners further pray that the proper order touching the security to be required to perfect their appeal be made.

A. L. WEIL,
U. T. CLOTFELTER,
CHARLES S. WHEELER and
JOHN F. BOWIE,

Solicitors for Said Defendants and Appellants.

Order Allowing Appeal.

The foregoing petition for appeal is hereby granted and allowed, and the bond on appeal to be given on behalf of the above-named appellants is hereby fixed at Five Hundred Dollars, to be conditioned according to law.

Dated March 3, 1916.

M. T. DOOLING,
Judge.

Due service and receipt of a copy of the within Petition for Appeal this 3d day of March, 1916, is hereby admitted.

E. J. JUSTICE,
ALBERT SCHOONOVER,
A. E. CAMPBELL,
FRANK HALL,

Attorneys for Plaintiff.

[Endorsed]: Original. No. A-48—Equity. In the United States District Court for the Southern District of California. United States of America, Plaintiff, vs. North American Oil Consolidated, et al., Defendants. Petition for Appeal and Order Allowing Appeal. Filed Mar. 4, 1916. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. U. T. Clotfelter, [98] A. L. Weil and Charles S. Wheeler and John F. Bowie, Attorneys for Defendant, North Am. Oil Cons., Union Trust Building, San Francisco. [99]

In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit.

No. A-48—EQUITY.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTH AMERICAN OIL CONSOLIDATED,
PIONEER MIDWAY OIL COMPANY,
UNION OIL COMPANY OF CALIFOR-

NIA, PRODUCERS TRANSPORTATION
COMPANY, WALTER P. FRICK, JOHN
F. CARLSTON, CLARENCE J. BERRY,
DENNIS SEARLES, WALTER H. LEI-
MERT and WICKHAM HAVENS,

Defendants.

Assignment of Errors.

Now come the defendants North American Oil Consolidated, Walter P. Frick, John F. Carlston, Clarence J. Berry, Dennis Searles, Walter H. Leimert and Wickham Havens, by their solicitors A. L. Weil, Esq., U. T. Clotfelter, Esq., and Charles S. Wheeler and John F. Bowie, Esqs., and aver that the interlocutory decree entered in the above-entitled action on the 3d day of February, 1916, to wit, the interlocutory decree appointing a Receiver, is erroneous and unjust to the said defendants, and file with their petition for appeal from said decree the following Assignment of Errors, and specify that said decree is erroneous in each and every of the following particulars, viz:

I. The District Court of the United States, for the Southern District of California, erred in appointing a Receiver upon the pleadings, evidence and proofs before the Court.

II. The District Court of the United States, for the Southern District of California, erred in appointing a Receiver in this action, for the reason that no right to the possession [100] of the real property involved is shown to be in plaintiff, and plaintiff did not show any probability that plaintiff was entitled to or would or could recover said real property or

the possession thereof, and that the appointment of a Receiver herein under the circumstances appearing is not in conformity with the rules and principles of equity.

III. The United States District Court for the Southern District of California erred in appointing a Receiver, for the reason that each quarter section of the section of land in controversy was on the 27th day of September, 1909, covered by a placer mining location or claim, which location or claim on said date belonged to the predecessor in interest of these defendants; that said locations or claims were on said 27th day of September, 1909, valid and existing locations or claims within the meaning of the President's withdrawal order of said date; that on said 27th day of September, 1909, the predecessor in interest of these defendants was in the actual, exclusive and peaceable possession of the lands embraced in said respective locations or claims, and on said date was diligently engaged in the prosecution of work leading to a discovery of oil or gas on said locations or claims; that said work was at all times thereafter duly and diligently prosecuted by said predecessor and by these defendants, and resulted, long prior to the commencement of this action, in the discovery of oil on each of said claims or locations, thereby perfecting the same under the laws of the United States as placer mining claims; that defendant North American Oil Consolidated is in possession under a valid agreement for the purchase of said mining claims and that the plaintiff has shown no equitable right or title whatever to said property

or any part thereof, and the appointment [101] of a Receiver under the circumstances is not conformable to the practice and rules of equity.

IV. The United States District Court, for the Southern District of California, erred in appointing a Receiver, for the reason that the evidence before the Court makes it clear that on the 27th day of September, 1909, the predecessor in interest of these defendants was the *bona fide* occupant and claimant of all of the land in controversy; that said land was and is oil or gas bearing land; that on said day said predecessor was in diligent prosecution of work leading to discovery of oil or gas on each quarter section of land; that thereafter said predecessor and these defendants continued in diligent prosecution of work until gas and oil were discovered on each of such claims; that such discoveries were made long prior to the commencement of this action; that these defendants have ever since continued to occupy and claim all of said lands and have continued in the diligent prosecution of work thereon; that plaintiff has no equitable right or claim whatsoever to said lands or any part thereof, and that the appointment of a Receiver under the circumstances is not in conformity with the rules and practice of courts of equity.

V. The District Court of the United States, for the Southern District of California, erred in treating the complaint as an affidavit and in considering the alleged facts therein set forth as evidence of a probable or any right in plaintiff, for the reason that said complaint was not so verified that the same could be

used for such purpose, inasmuch as it appears that the affiant had no personal knowledge of any facts alleged which facts if true, would tend to destroy the validity of the titles, rights, interests or claims of these defendants in and to said land, but [102] that such allegations are mere heresay based upon the statements and examinations and affidavits of third persons.

WHEREFORE, appellants pray that said interlocutory decree be reversed, and that said District Court for the Southern District of California, Northern Division, be ordered to enter a decree reversing the decision of the lower court in said action.

A. L. WEIL,
U. T. CLOTFELTER,
CHARLES S. WHEELER and
JOHN F. BOWIE,

Solicitors for Defendant and Appellants North American Oil Consolidated, Walter P. Frick, John F. Carlston, Clarence J. Berry, Dennis Searles, Walter H. Leimert and Wickham Havens.

Due service and receipt of a copy of the within Assignment of Errors this 3d day of March, 1916, is hereby admitted.

E. J. JUSTICE,
ALBERT SCHOONOVER,
A. E. CAMPBELL,
FRANK HALL,

Attorneys for Plaintiff.

[Endorsed]: Original. No. A-48—Equity. In the United States District Court for the Southern

District of California. United States of America, Plaintiff, vs. North American Oil Consolidated et al., Defendants. Assignment of Errors. Filed Mar. 4, 1916. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. U. T. Clotfelter, A. L. Weil and Charles S. Wheeler, John F. Bowie, Attorneys for Defendant, North American Oil Consolidated. Union Trust Building, San Francisco. [103]

In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit.

No. A-48—EQUITY.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTH AMERICAN OIL CONSOLIDATED,
PIONEER MIDWAY OIL COMPANY,
UNION OIL COMPANY OF CALIFORNIA,
PRODUCERS TRANSPORTATION
COMPANY, WALTER P. FRICK, JOHN F.
CARLSTON, CLARENCE J. BERRY,
DENNIS SEARLES, WALTER H. LEI-
MERT and WICKHAM HAVENS,

Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That the undersigned, Massachusetts Bonding and Insurance Company, as surety, is held and firmly bound unto United States of America in the sum of

Five Hundred and 00/100 (\$500) Dollars, lawful money of the United States, to be paid to said United States of America; to which payment, well and truly to be made, we bind ourselves, and our successors, by these presents.

Sealed with our seal and dated this 3d day of March 1916.

WHEREAS, the above-mentioned North American Oil Consolidated, Walter P. Frick, John F. Carlston, Clarence J. Berry, Dennis Searles, Walter H. Leimert, and Wickham Havens have obtained an appeal to the Circuit Court of Appeals of the United States, to correct or reverse the order or decree of the District Court of the United States, for the Southern District of California, in the above-entitled cause. [104]

NOW, THEREFORE, the condition of this obligation is such that if the above-mentioned parties shall prosecute their said appeal to effect, and answer all costs if they fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

MASSACHUSETTS BONDING AND INSURANCE COMPANY.

By FRANK M. HALL,
By S. M. PALMER,
Attorneys in Fact. (Seal)

The within bond is approved both as to sufficiency and form this 3d day of March, 1916.

M. T. DOOLING,
Judge.

[Endorsed]: No. A-48—Eq. In the United States District Court for the Southern District of California. U. S. of America, Plaintiff vs. North American Oil Consolidated et al., Defendant. Bond on Appeal. Filed Mar. 4, 1916. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Charles S. Wheeler, Attorney for ———, Union Trust, Building, San Francisco. [105]

In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit.

No. A-48.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTH AMERICAN OIL CONSOLIDATED, PIONEER MIDWAY OIL COMPANY, UNION OIL COMPANY OF CALIFORNIA, PRODUCERS TRANSPORTATION COMPANY, WALTER P. FRICK, JOHN F. CARLSTON, CLARENCE J. BERRY, DENNIS SEARLES, WALTER H. LEIMERT and WICKHAM HAVENS,

Defendants,

Praeipie for Transcript on Appeal.

To the Clerk of the Above-entitled Court:

Please make up, print and issue in the above-entitled cause a certified transcript of the record, upon an appeal allowed in this cause, to the Circuit Court

of Appeals of the United States, for the Ninth Circuit, sitting at San Francisco, California; the said transcript to include the following:

Bill of Complaint;

Answer of Defendants North American Oil Consolidated, Walter P. Frick, John F. Carlston, Clarence J. Berry, Dennis Searles, Walter H. Leimert, and Wickham Havens;

Notice of Motion for Receiver and Restraining Order;

Order Directing the Appointment of a Receiver;
[106] together with opinions in cases A-2 and A-38 referred to therein;

Order Appointing a Receiver;

Petition for Appeal;

Order Allowing Appeal;

Assignment of Errors;

Bond on Appeal;

Citation;

Stipulation on Severance;

Notice of Lodgment of Statement of Evidence;

Statement of Evidence on Appeal;

Praecipe for Transcript on Appeal.

You will please transmit to the Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, the said record when prepared, to-

gether with the original citation on appeal.

U. T. CLOTFELTER,

A. L. WEIL,

CHARLES S. WHEELER and

JOHN F. BOWIE,

Solicitors for Said Defendants and Appellants
North American Oil Consolidated, Walter P.
Frick, John F. Carlston, Clarence J. Berry, Den-
nis Searles, Walter H. Leimert and Wickham
Havens.

Due service and receipt of a copy of the within
Praecipe for Transcript, this 15th day of March,
1916, is hereby admitted.

E. J. JUSTICE,

ALBERT SCHOONOVER,

A. E. CAMPBELL,

FRANK HALL,

Attorneys for —————.

[Endorsed]: No. A-48—Equity. In the United
States District Court for the Southern District of
California. United States of America, Plaintiff, vs.
North American Oil Consolidated et al., Defendants.
Praecipe for Transcript on Appeal. [107] Filed
Mar. 16, 1916. Wm. M. Van Dyke, Clerk. By R.
S. Zimmerman, Deputy Clerk. U. T. Clotfelter, A.
L. Weil, Charles S. Wheeler, and John F. Bowie,
Attorneys for Defendant North American Oil Cons.,
Union Trust Building, San Francisco. [108]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.**

*In the District Court of the United States, in and for
the Southern District of California, Northern
Division.*

IN EQUITY—No. A-48—EQ.

THE UNITED STATES OF AMERICA,

Complainants,

vs.

NORTH AMERICAN OIL CONSOLIDATED, PIO-
NEER MIDWAY OIL COMPANY, UNION
OIL COMPANY OF CALIFORNIA, PRO-
DUCERS TRANSPORTATION COMPANY,
WALTER P. FRICK, JOHN F. CARL-
STON, CLARENCE J. BERRY, DENNIS
SEARLES, WALTER H. LEIMERT and
WICKHAM HAVENS,

Defendants,

I, Wm. M. Van Dyke, Clerk of the District Court
of the United States of America, in and for the
Southern District of California, do hereby certify
the foregoing one hundred eight (108) typewritten
pages, numbered from 1 to 108, inclusive, and com-
prised in one (1) volume, to be a full, true and cor-
rect copy of the Bill of Complaint, Answer of De-
fendants, North American Oil Consolidated et al.,
Notices of Motion for Receiver and Restraining Or-
der, Order Directing Appointment of Receiver,
Order Appointing Receiver, Notice of Lodgment of

Statement of Evidence, Statement of Evidence on Appeal, Stipulation on Severance, Petition for Appeal, and Order Allowing Appeal, Assignment of Errors, Bond of Appeal and Praecipe for Transcript on Appeal, all in the above and therein entitled action, also of the Opinion of the Court in case A-2—Equity, referred to in the Order Directing Appointment of Receiver in this cause, and of the Opinion of the Court in case A-38—Equity, referred to in the Order Directing Appointment of Receiver in this cause, and that the same together constitute the Record [109] on Appeal herein, as specified in the aforesaid Praecipe for Transcript on Appeal, filed in my office on behalf of the appellants by their solicitors of record.

I do further certify that the cost of the foregoing record is \$52.90, the amount whereof has been paid me by North American Oil Consolidated, a corporation, Walter P. Frick, John F. Carlston, Clarence J. Berry, Dennis Searles, Walter H. Leimert and Wickham Havens, the appellants herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand, and affixed the seal of said District Court of the United States of America, in and for the Southern District of California, Northern Division, this 28th day of April, in the year of our Lord one thousand nine hundred and sixteen, and of our

Independence, the one hundred and fortieth.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States of
America, in and for the Southern District of
California.

By Leslie S. Colyer,
Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled
4/28/16. L. S. C.] [110]

[Endorsed]: No. 2789. United States Circuit
Court of Appeals for the Ninth Circuit. North
American Oil Consolidated, a Corporation, Walter
P. Frick, John F. Carlston, Clarence J. Berry, Den-
nis Searles, Walter H. Leimert and Wickham
Havens, Appellants, vs. The United States of Amer-
ica, Appellee. Transcript of Record. Upon Ap-
peal from the United States District Court for the
Southern District of California, Southern Division.
Filed May 1, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

[Stipulation and Order Extending Time to May 1, 1916, to Prepare and File Transcript of Record on Appeal.]

In the District Court of the United States, for the Southern District of California, Northern Division.

No. A-48—EQUITY.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTH AMERICAN OIL CONSOLIDATED et al.,
Defendants,

IT IS HEREBY STIPULATED that the appellants herein may have to and including the first day of May, 1916, within which to prepare and file their Transcript on Appeal in the above-entitled proceeding.

Dated April 15th, 1916.

E. J. JUSTICE,
A. E. CAMPBELL,
FRANK HALL,
Solicitors for Plaintiff.

It is so ordered.

WM. W. MORROW,
Judge.

United States Circuit Judge Ninth Judicial Circuit.

[Endorsed]: No. A-48. In the United States District Court for the Southern District of California. United States of America, Plaintiff, vs. North

American Oil Consolidated et al., Defendants.
Stipulation.

No. ——. United States Circuit Court of Appeals
for the Ninth Circuit. Stipulation and Order Under
Rule 16 Enlarging Time to May 1, 1916, to File Rec-
ord Thereof and to Docket Case. Filed Apr. 15,
1916. F. D. Monckton, Clerk.

**[Order Extending Time to June 1, 1916, to Docket
Cause and File Record on Appeal.]**

*In the United States Circuit Court of Appeals, Ninth
Judicial Circuit.*

NORTH AMERICAN OIL CONSOLIDATED, PIO-
NEER MIDWAY OIL COMPANY, UNION
OIL COMPANY OF CALIFORNIA, PRO-
DUCERS TRANSPORTATION COMPANY,
WALTER P. FRICK, JOHN F. CARL-
STON, CLARENCE J. BERRY, DENNIS
SEARLES, WALTER H. LEIMERT and
WICKHAM HAVENS,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Good cause appearing therefor, it is hereby or-
dered that the time heretofore allowed said appel-
lants to docket said cause and file the record thereof
with the Clerk of the United States Circuit Court
of Appeals for the Ninth Circuit, be and the same is

hereby enlarged and extended to and including the first day of June, 1916.

Dated at Los Angeles, California, March 13, 1916.

M. T. DOOLING,
U. S. District Judge.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. North American Oil Consolidated et al., Appellants, vs. United States of America, Appellees. Order Extending Time to File Record. Filed Mar. 20, 1916. F. D. Monckton, Clerk.

No. 2789. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to ——— to File Record Thereof and to Docket Case. Refiled May 1, 1916. F. D. Monckton, Clerk.



